Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-77

John Holly, Jr.,

Petitioner

v.

Ohio Edison Company,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

THOMAS L. COROGIN
128 Madison Street
Port Clinton, Ohio 43452

Attorney for Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES
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NO.

John Holly, Jr.,

Petitioner

v.

Ohio Edison Company,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio

Petitioner John Holly, Jr. prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this case on April 17, 1975, denying Petitioner a hearing on his appeal and to review of the judgment of the Court of Appeals of Ottawa County, Ohio, the highest state court which heard this case on its merits, and to order either of those Courts to sustain the Judgment of the trial court.

OPINIONS BELOW

The order of the Common Pleas Court of Ottawa County, Ohio, finding in favor of this Petitioner, and the decision of the Court of Appeals of the Sixth Appellate District of Ohio reversing that order, are printed in the Appendix of this Memorandum.

The Supreme Court of the State of Ohio did not rule on the merits of the case, but dismissed Petitioner's Appeal to that Court on April 17, 1975.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio entered judgment dismissing Petitioner's Appeal and overruling his Motion for an Order Directing the Court of Appeals to Certify its Record on April 17, 1975.

The Supreme Court of Ohio would not hear this case claiming there was no constitutional question involved.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and this Court's Rule 22 (1) inasmuch as the Ohio Courts have denied Petitioner's rights, privileges and immunities guaranteed him under the Constitution of the United States.

The decision of the trial, Appellate and highest courts of Ohio are unreported.

QUESTIONS PRESENTED

1. Do the Constitutional safeguards under the Fifth and Fourteenth Amendments protecting private property from appropriation apply only to the condemnation proceedings filed in a Court of Law, or do these safeguards protect a property owner in his home?

2. Where a corporation having the power of eminent domain comes to Petitioner's home and obtains his signature to an option for right of way for a high voltage transmission line and the consideration paid is for the area taken only, does the option deny just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution by denying damage to the remaining land?

3. If a property owner does not release his right to damage to the remaining realty, is he entitled to a jury trial to determine the damage, if any, pursuant to the requirement of "just" compensation under the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution and "full" compensation under Article XIII, Section 5, of the Ohio Constitution?

4. Can a property owner be held to have waived his right to compensation for damage to remaining land when no such waiver is distinctly made, when the property owner

does not have full knowledge of the rights which he waives, and when the fact that the property owner knew his rights and intended to waive them did not plainly appear?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisionsinvolved are that portion of the Fifth Amendment to the Constitution of the United States which reads in part:

> ... nor shall private property be taken for public use without just compensation;

And that portion of the Fourteenth Amendment to the United States Constitution which reads as follows:

> ... nor shall any State deprive any person of life, liberty or property without due process of law.

The Constitutional provision invoked herein in the Constitution of the State of Ohio is that part of Article I, Section 19, which reads:

> ... and in all other cases where private property shall b be taken for public use, a compensation therefor shall first be made in money, or first secured by deposit of money; and such compensation shall be addressed by a jury, without deductions for benefits

to any property of the owners;

And Article XIII, Section 5, of the Constitution of the State of Ohio, which reads:

> **No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation: which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.**

Those Statutes of the State of Ohio giving the corporation herein the right to appropriate property are Sections 1723.01 and 1723.02, contained in the Appendix hereof.

Section 163.14 of the Ohio Revised Code provides for a verdict by a jury which shall:

> **. . . assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners.**

Complete text of this statute is included in the Appendix in Exhibit F.

STATEMENT OF THE CASE

On April 4, 1972, Respondent Ohio Edison Company, an Ohio corporation having the power of eminent domain, obtained the signature of Petitioner John Holly, Jr. to two options to purchase easements and rights of way for the erection, inspection, operation, replacement, relocation, repair and patrol of a high voltage electric transmission line through his real estate. Copies of said options are shown in the Appendix as Exhibits G and H. Said options contained the following language:

> "The exact location of said right of way is to be designated by Grantee after its final surveys are made and in any event before the construction of said lines shall be commenced."

John Holly was given $20.00 for the signing of these options. Nowhere in these options is there mention or release of damages to remaining land or reduction in value of remaining land as a result of this type of easement.

Subsequently, John Holly was approached by Ohio Edison and requested to sign an easement instrument, a copy of which appears in the Appendix as Exhibit I. The easement instrument contained different descriptions

than those contained in the options as follows: the options contained descriptions in rods whereas the easement contained descriptions in feet and one description described an area forty feet wider, which was double the width of the easement. These variances in description were acknowledged by the Court of Appeals in its decision and journal entry filed February 4, 1975, copied in Exhibit B in the Appendix.

A comparison between the option description and the easement description, line by line, showing the difference in feet is enclosed in the Appendix as Exhibit J.

When approached to sign the easement instrument, John Holly consulted his attorney and was advised not to sign the easement document because of the variance in description and because no provision was made for damage to residue. Ohio Edison then deposited in John Holly's bank the sum of $3500.00 which was the payment recited in the option and demanded that he execute the tendered easement. He again refused and Ohio Edison filed a suit in specific performance. Holly defended, contending his constitutional rights were violated and asked for the impaneling of a jury to assess damage, if any, to residue.

The Federal questions sought to be reviewed were first raised by Petitioner in

the trial court in his Amended Answer as follows:

> "Defendant alleges that Plaintiff has indicated that it wants an easement for a high voltage transmission line over and through Defendant's real estate, but that it does not want to pay damages to residue, if any, required by law, contrary to Article XIII, Section 5, and Article I, Section 19, of the Constitution of the State of Ohio and contrary to the due process requirement of the Fourteenth Amendment and the Seventh and Ninth Amendments of the Constitution of the United States."

The trial court ruled in favor of Holly but did not mention any federal question in its decision. The trial court found that Ohio Edison did not request Holly to convey the description in the option, but another description which contained variances both as to length and width. The trial court further found that Ohio Edison presented no evidence showing that it requested Holly to execute an easement containing identical descriptions with those in the option. The Court said it could only apply a description and not supply one. It denied Ohio Edison's request for

specific performance of the options by judgment dated July 30, 1974, a copy of which is found in the Appendix as Exhibit A.

Ohio Edison appealed this decisision to the Court of Appeals of Ottawa County, Ohio, without raising any constitutional questions.

The judgment of the trial court was reversed, the Court of Appeals holding that a variance in realty description is not sufficient basis for refusal to execute the easement document. This decision was filed February 4, 1975, and a copy of it is included in the Appendix as Exhibit B. Holly did not file any assignments of error in the Court of Appeals since he was the Appellee.

Subsequently, Holly filed a motion with the Court of Appeals to certify the record in this case to the Ohio Supreme Court because of the constitutional questions involved and conflict with judgments of other Courts of Appeals. These other decisions held in effect that an option description had to be sufficiently detailed to enable description of the property. Holly contended that the unilateral right of Ohio Edison to change the description and the fact that it did change the description precluded any meeting of the minds on a description of the real estate being taken. This motion was overruled by the Court of Appeals on February 18, 1975, and a copy of that decision is included in the Appendix as Exhibit C.

Holly filed a Motion to Certify to the Supreme Court of the State of Ohio. Assignments of Error are not required in a Motion to Certify. Instead, the Ohio Supreme Court requires propositions of law. The propositions of law which were cited by Holly rely upon the Fifth and Fourteenth Amendments to the United States Constitution. Propositions of Law numbers one, two, three, five and six are quoted in the Appendix as Exhibit N. This appeal was denied. Copies of the orders of the State Supreme Court dismissing the appeal are found in the Appendix as Exhibits D and E.

HOW FEDERAL QUESTIONS WERE PREVIOUSLY PRESENTED

The Federal question of whether Petitioner's Constitutional rights were violated by the corporation was originally presented in the trial court wherein Petitioner raised the issue in his Answer. The Petitioner cited said Constitutional provisions throughout the trial court proceedings and again in the Court of Appeals.

In his attempted appeal to the Supreme Court of Ohio, Petitioner again raised the issue of Constitutional protection under Article XII, Section 5, of the Constitution of the State of Ohio and the Fifth Amendment and Due Process Clause of the Fourteenth Amendment of the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. IT IS VITAL TO THE CONSTITUTIONAL RIGHTS OF PROPERTY OWNERS THAT THIS COURT ESTABLISH STANDARD PROCEDURES TO BE FOLLOWED IN LAND ACQUISITION BY CORPORATIONS.

There is a unique problem when a body having the power of eminent domain approaches a property owner for the purpose of taking his land for public use. Rules for "arms length" transactions and the assumption of "willing buyer" and "willing seller" do not apply. There can be no "willing seller" when the threat of condemnation proceedings is ever present in the negotiations. The possibility of a court action and the cost of any such action is, by itself, enough to intimidate many a property owner into settling with the appropriating agency or corporation. In addition, most property owners are inexperienced with easements -- especially high voltage electric easements as in this case -- and do not realize the effects such a right of way will have on the remaining portion of their property until it is too late.

Petitioner contends that it is just as essential to "assure consistent treatment for owners" of property appropriated by corporations in the various states as it is to the owners of property appropriated by states

for highways, public housing, etc. Yet no such law exists for corporations and a corporation, with private stockholders, is not required to appraise the property; nor to offer the property owner "full" value for the land; nor to list the amount paid for damage to remaining land separately from that paid for the land taken. A corporation having private ownership of stock is not even required to inform the landowner that there will be a reduction in the market value of his remaining land because of the easement -- or that the property owner has any right to be compensated therefor. Instead, each separate corporation is allowed to establish its own policy for negotiating with property owners, often resulting in inconsistent, unfair and inadequate compensation being paid to many property owners who settle out of Court. This whole process totally disregards the Constitutional rights to "just" compensation.

Yet, after the settlement, the property owner has very little, if any, legal redress against the corporation. The corporation will claim the property owner has waived all his rights to damage to remaining property, etc. -- even though the property owner did not intentionally and knowingly waive such rights.

In the case of Gladys and Walter B. Farmer v. The Toledo Edison Company, Ottawa County, Ohio, Common Pleas Court Case No. 17402 (1972) (unreported), the trial

judge ventured into a new area of law in the following decision:

> It seems to this Court, while he can find no decisions to substantiate what he says, that a utility company should be compelled to have an appraisement made and a knowledge of the value and effect on the easement when they send people out to negotiate and that the Toledo Edison pay a price, at least a fair price, for the reasons that they are not standing on an equal basis with the seller, and that they can not deal on a willing buyer and seller basis because the landowner is not a willing seller. (Complete order in Appendix hereof as Exhibit K.)

The Court of Appeals for the Sixth Appellate District of Ohio reversed this decision because they could find no precedent for it. Appeals were denied in both the Supreme Court of Ohio and this Supreme Court.

If there is to be any distinction made between the requirements for the appropriation of property by the state and by a utility corporation that has private ownership of stock, Petitioner believes that it is the utility rather than the state which needs the more stringent rules and guidelines. The state has

no dollar incentive to get the land from the property owner as cheaply as possible, as does the private corporation. The difference between "fair compensation" and an "unfair" and low price" made by the state will be paid by all from tax revenues. But the corporation will be motivated by profit considerations to save as much as possible of its private stockholders' money and get as low a price as possible.

Petitioner requests that this Court protect the rights of a property owner as guaranteed him by the United States and Ohio Constitutions by setting out rules which must be followed by corporations in negotiating for property which could be taken through an appropriation proceeding.

II. UNDER THE PRETENSE OF FOLLOWING THE EXISTING LAW, PRIVATE PROPERTY IS BEING TAKEN FOR PUBLIC USE, BUT JUST COMPENSATION HAS NOT BEEN PAID.

The facts of this case present this Court with the opportunity to review the actions of a public utility company in its taking of privately owned land for public use. In this case submitted for the Court's review, Petitioner seeks to establish his rights as guaranteed him by the Constitution of the United States and seeks an order declaring the option granted Ohio Edison void.

Our Constitution and laws guarantee property owners that when our Government or others authorized by our Government find it essential in the public interest to take private property, the owners will be fully compensated for it.

"Full" compensation as required by Article XIII, Section 5, of the Ohio Constitution and "just" compensation as required by the Fifth Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution have as their constituent components (1) payment for land taken and (2) payment for reduction in value of remaining land. Section 163.14, O.R.C., provides that a jury shall assess damages which shall include:

> . . . the compensation for the property appropriated and damages, if any, to be paid to the owners.

This concept of just compensation is substantiated by the following citations:

As stated in In Re Appropriation for Highway Purposes, 6 Ohio App. 2d 6 (Allen Co., 1966):

> In determining the market value of property to be taken, each case must be considered

> in the light of its own facts, and every element that can fairly enter into the question of value and which an ordinarily prudent businessman would consider before forming judgment in making a purchase, should be considered.

Also see Sayre v. United States, 18 Ohio Misc. 23, 35 (United States District Court, Northern District, Eastern Division, 1967):

> Whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is upon principle and authority wanting in the due process of law required by the Fourteenth Amendment of the United States. . ." Malloy v. Hogan (1964) 378 U.S. 1, at 4 84 S. Ct. 1489, at 1491, 12 L. Ed. 2d 653, construed Chicago B. & O. R.R. v. Chicago (1897), 166 U.S. 226, at 241, 17 S. Ct. 581, at 586, 41 L. Ed. 979, to hold that: "the Due Process Clause requires the states to pay just compensation for private property taken for public use." Thus, the Supreme Court determines that the due process clause of the Fourteenth

> Amendment is the equivalent of the Fifth Amendment provision "nor shall private property be taken for public use, without just compensation."

That the presence of a high voltage transmission line adversely affects the market value of the remaining land and, therefore, damages the residue and is reason for compensation for such damages has been established by Van Horn v. Iowa Public Service Co., 182 N.W. 2d 365 (1970):

> Any factor that will impress a willing buyer in purchasing property, if otherwise competent, is both material and relevant in establishing deiminished value of remainder of property following taking of portion of tract.
>
> Every element which can fairly enter into question of value and which an ordinary prudent man would consider before forming judgment in making a purchase should be considered, not as an independent element of damages, but as a factor in determining the market

value of remaining property
after taking a portion of
tract.

Further supporting cases are Georgia Power v. Sinclair, 176 S.E. 2d 639 (1970); Gulf States Utilities Co. v. Robin, 237 So. 2d 422 (1970); Central Louisiana Electric Co. v. Fontenot, 159 S 2d 738 (1964).

Further, Petitioner requests this Court to find that no private property owner can waive his rights to "just" and "full" compensation -- both for area taken and residue -- unless such waiver is distinctly made, with full knowledge of the right which he intends to waive; and the fact that he knows his rights and intends to waive them, must plainly appear. See 56 Am. Jur. 115.

In this case, the corporation approached Petitioner and succeeded in securing his signature to options for easements across his land. They did this without any consideration of the damages inflicted on the remaining portion of the property. They did not tell the Petitioner that he had a right to receive compensation for any such damages or that he would be waiving that right by signing said option. It cannot be presumed that any property owner knows either the effects of the easement to his property or his rights for "full" compensation both as to the "take" and "residue".

The Record shows, that instead of intentionally waiving his rights to compensation for damages, the property owner was left with the impression that the corporation would negotiate with him as to the amount of damages when and if the corporation decided to exercise the option for the easement. (See copy of Mr. Holly's testimony, Exhibit L of this Appendix). This evidence was not contradicted by the corporation.

Petitioner contends that whenever a corporation possessing the power of eminent domain approaches a property owner with the intent of purchasing his property that the Constitutional safeguards against the unlawful taking of private property apply; that such Constitutional safeguards do in fact apply from the first negotiations between the public authority and the private owner and are not to be applied merely in a final Court action of appropriation. In such a case, Petitioner urges that this Court require the corporation, when approaching the property owner for the purpose of securing his land, or part of his land, to consider damage to remaining land while bargaining with the property owner.

In addition to violating Petitioner's Constitutional rights by ignoring damages to residue of his land, the option gives the corporation the unilateral right to change and even to enlarge the easement area without paying for the additional land taken. Such a

provision is clearly unconstitutional.

Petitioner asks, that in the event this Court decides he must convey the requested larger easement to the corporation, it also find that he has not waived his right to damages to the remaining land, since there was no discussion of and no release of these rights. The requirements of "just" compensation can be met only if Petitioner is granted a trial so that a jury can assess the damages, if any, to the remainder of his property.

III. IT IS NECESSARY FOR THIS COURT TO SET GUIDELINES FOR THE UTILITY COMPANIES NOW AS MORE AND MORE ELECTRIC PLANTS ARE BEING PLANNED AND BUILT TO MEET THE COUNTRY'S GROWING NEED FOR ENERGY.

At least seven nuclear reactors are planned for Northern Ohio. Three reactors are being built along Lake Erie ten miles west of Port Clinton, Ohio, and two are being built ten miles east of Port Clinton. As the push for more energy continues, more and more electric power plants are being planned throughout the United States.

As a result of this construction, rights of way are being appropriated for transmission lines by many utility companies. Each company has a different procedure for acquiring

a right of way. The utility companies have not had any organized program for approaching property owners and as a result there have been misunderstandings with property owners about values, particularly in the area of damages to residue.

Copies of newspaper articles appearing in local papers are shown in the Appendix in an effort to point out to this Court the need for law in the area of easement acquisition.

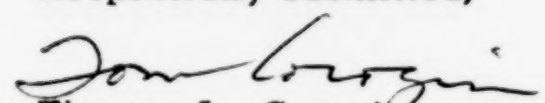
Petitioner requests this Court to set forth guidelines now, to be used in the various state courts in determining the legality of utility corporations' right of way easement settlements.

CONCLUSION

The Appellate Courts of Ohio are not following the Constitutional requirements for acquisition of right of way. We are now in a large scale nuclear power plant expansion program and ground rules should be established to prevent any utility company from taking advantage of property owners.

For the foregoing reasons, it is urged that this writ be granted.

Respectfully submitted,



Thomas L. Corogin
128 Madison Street
Port Clinton, Ohio 43452

Attorney for Petitioner

APPENDIX

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS OF OTTAWA COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF OTTAWA COUNTY, OHIO

Ohio Edison Company,
Plaintiff

Case No. 18085

v.

Date: 7/30/74

John Holly, Jr.,
Defendant

JUDGMENT

This matter comes on to be heard on the trial on the merits and on Plaintiff's motion filed December 17, 1973, for an award of expenses and attorney fees in connection with said motion to compel discovery.

After Plaintiff's motion was filed Defendant, on January 7, 1974, filed a motion for a protective order under Civ. R. 26-B. Both Plaintiff's motion to compel discovery and Defendant's motion for a protective order were heard at the same time on January 30, 1974. At said hearing said Defendant testified further on cross examination as a supplement to his depostion of September 14, 1973, and filed in this Court December 27, 1973. The Court's docket entry of January 30, 1974,

Exhibit A

says. "Motions of Plaintiff and Defendant heard and decided - - see judgment entry." However, no judgment entry appears of record concerning said motions. Nevertheless, because the Court remembers having continued that part of Plaintiff's motion concerning expenses and attorney fees, the Court disposes of these matters as follows:

The matters of which Plaintiff complains in its motion are not instances of failure to obey a court order under Civ. R. 37 (B), but properly come under the last paragraph of Civ. R. 37 (A) (4), Civ. R. 30 (E), and the last sentence of Civ. R. 30 (D). As authority for its decision herein the Court cites Ward v. Hester, et al. (1973) 36 O.S. 2d 38; Sexton v. Sugar Creek Packing Co. (1973) 38 O. App.2d 32; and, State Auto Mutual v. Chrysler Corp. (1973) 36 O.S. 2d 151.

That part of Plaintiff's motion dealing with Defendant's failure to sign his deposition [illegible]wered in the second paragraph of Defendant's memorandum filed December 24, 1973. In any event said matter is not a subject for action under the sanctions of Civ. R. 37; Civ. R. 30 (E) outlines the effects of Defendant's not signing.

Concerning the failure of Defendant to answer those questions propounded to him by Plaintiff at Pages 9 through 17 of the deposition of September 14, 1973, the Court finds there

was no willfulness or bad faith on Defendant's part and that Defendant immediately answered questions in open court after objections were resolved; that Defendant's motion to limit questions demonstrates the good faith of the objections contained in said Defendant's deposition and are illustrated further by objections made by Defendant in the deposition of James E. Lannen taken February 6, 1974, and filed in this court on February 28, 1974; that the Lannen deposition resulted not of Defendant's refusal to answer questions at the original deposition of Defendant on September 14, 1973, Lannen's deposition resulting because Defendant's answers in court on January 30, 1974, did not provide Plaintiff with necessary information.

This Court further finds that as to Plaintiff's motion of December 17, 1973, said motion being to compel the discovery in question, that this Court granted said motion in part and denied said motion in part. Therefore, as to any possible sanctions, Plaintiff's request for expenses and attorney fees comes under the provisions of the last paragraph of Civ. R. 37 (A) (4) and the latter part of the first paragraph of Civ. R. 37 (A) (4) and this Court finds that the opposition to Plaintiff's motion was substantially justified and that the circumstances makes an award of expenses unjust. Therefore, this Court hereby denies Plaintiff's motion for expenses and attorney fees.

It should be further noted that the last sentence of Civ. R. 30 (D) allows an award under Civ. R. 37, of expenses incurred in relation to a motion to limit examination of a deponent or party, such as was the case here and which the Court granted. The Court notes that Defendant made no request for expenses or attorney fees and accordingly the same is not granted.

This matter also came on to be heard upon the motion of Defendant for a directed verdict or judgment on the evidence at the end of Plaintiff's case.

In interpreting the evidence strongest in favor of Plaintiff, the Court makes the first finding of fact: that the evidence here establishes that Plaintiff did not request of Defendant a conveyance of the description, whatever it may be called, as it was alleged in Plaintiff's complaint; namely, Exhibits A and B, now today entitled 1 and 2; that Plaintiff's demand of Defendant was with the description, or whatever it may be called, as in Exhibits 8 and 9. The Court finds that there are variances as to both length and width in the figures contained therein. Specifically, the Court makes another finding: that there was no evidence shown that Plaintiff requested of Defendant a transfer, as per Exhibits 1 and 2.

Now, these being specific findings of

fact, and ruling upon Defendant's motion, the Court finds, first, there having been no request, the issue as to Exhibits 1 and 2, if they can be -- whether or not they can be specifically enforced is not before the Court, or, if it was, it has been abandoned by the evidence. But the Court will go one step further. The Court would find that 1 and 2 by their own language and using the term "location" -- the Court is well aware of one of these decisions which it had before it today, speaking in terms that the Court cannot supply description, it may only apply a description. Cannot supply but it can apply. One of the things it can apply is location. Then you go to 1 and 2, you find the word "location" used in both before the typed description and after the typed description. However, in 1 and 2 the first location -- word "location" is and does follow the word "described" in part of the legal description. Therefore, the meaning of the word "location" cannot be assumed to be the same in 1 and 2 as the judge used it in the case -- the exact case I forget which one it was, but one of those that was cited today and which the Court read.

The Court must interpret the word "location" in Exhibits 1 and 2 as referring to legal description, not a spot on the ground such as was used by the judge in the Supreme Court decision. Therefore, in 1 and 2 the Court finds the description being indefinite and contemplated, in other words, supplying

a description, a future description yet to be made, and since 1 and 2 in a later paragraph, after the typed one, do not preclude an interpretation requiring the necessity of Defendant's consent to a new description. It is the paragraph immediately following the description, typed description in 1 and 2. Since that language does not preclude the necessity of Defendant, such a future description may include necessity of the grantor agreeing to the same.

Now, --but all of these latter statements were "but if", "but if" being if Plaintiff has not abandoned 1 and 2 as a claim and if even though they introduce no evidence concerning the request, that the law should be that they don't have to, that a lawsuit in and of itself is sufficient request. All of the courts' rulings follow thereafter.

The evidence today was really concerning your request as to 8 and 9, and in that regard the Court finds sufficient record that it is not in accordance with 1 and 2; the description is not exact in the matters already mentioned, nor as to ingress, egress.

Concerning Plaintiff's oral motion that the Court retain jurisdiction herein to resolve the question involving the $3500.00 put by Plaintiff into Defendant's bank account and order Defendant to return the same plus interest, Court hereby grants unto Plaintiff

2 weeks to file a legal brief in support of this Court's jurisdiction and authority to so order in this case; Defendant granted 2 weeks thereafter to file an answer brief; Plaintiff granted 1 week thereafter to file a reply brief, after which said motion will be decided by the Court without oral argument unless for good cause an oral hearing is granted.

It is therefore ordered, adjudged and decreed that Defendant be and hereby is granted judgment against Plaintiff and that Plaintiff's demand for specific performance be and hereby is denied.

It is further ordered, adjudged and decreed that Plaintiff is entitled to recover the $3500.00 deposited in Defendant's bank account, plus any interest received by Defendant less any taxes paid thereon by Defendant.

It is further ordered that Defendant's request for expenses and attorney's fees be in the same is hereby denied.

Exceptions to each party; costs to Plaintiff.

JUDGE'S SIGNATURE

JUDGMENT ENTRY OF THE COURT OF APPEALS OF THE SIXTH APPELLATE DISTRICT OF OHIO

IN THE COURT OF APPEALS OF OTTAWA COUNTY

Ohio Edison Company,

APPELLANT

vs.

John Holly, Jr.,

APPELLEE

Court of Appeals No. 463

Trial Court No. 18085

DECISION & JOURNAL ENTRY

DATE: January 24, 1975

The record reveals that plaintiff-appellant obtained two option agreements, identified as Plaintiff's Exhibits 1 and 2, executed by defendant-appellee by which defendant-appellee gave and granted to plaintiff a right and option to purchase before March 31, 1973, an easement and right-of-way for electric transmission lines traversing specifically described parcels of real estate owned by defendant. On or about March 22, 1973, and before the expiration of the option period, plaintiff exercised its two options by tendering to defendant the entire purchase price of $3,500.00 specified in the two option agreements, and deposited such sum to the account of defendant in the American Bank, Port Clinton, as specified in

Exhibit B

the option agreement. Simultaneously, and before March 31, 1973, plaintiff tendered to defendant two easement documents identified as Plaintiff's Exhibits 8 and 9, which contained real estate descriptions varying from the realty descriptions in the two option documents. One easement document described realty which in one area was approximately 40 feet wider than the option description. The easement documents contained realty descriptions containing only 2.6 acres and the option agreements described an area of 3.5 acres. Before March 31, 1973, defendant refused to execute the two easement documents, Plaintiff's Exhibits 8 and 9. The option agreements provided, inter alia:

> "*** all of the provisions contained in this option shall, *** be incorporated into a final instrument of conveyance, ***provided grantee pays or tenders to grantor *** in full satisfaction of rights obtained, the sum of ***. *** and such tender, payment or deposit shall constitute a full compliance of grantee's obligations hereunder, and grantor shall forthwith execute and deliver a final instrument of conveyance *** to grantee ***."

Defendant never fulfilled the responsibility imposed upon him by such provision to prepare, execute or deliver to plaintiff easement documents containing the same description as contained in the option agreements. Thereafter, after commencement of

this legal action, plaintiff prepared and tendered to defendant and filed in the record in this action on April 15, 1974, two easement documents for defendant's signature containing the exact real estate description as contained in the two option agreements, Plaintiff's Exhibits 1 and 2, but defendant has failed and refused to execute such agreements. The option agreements were binding upon defendant, the terms and real estate description therein definite and certain, and plaintiff had exercised its rights to purchase under the options and had fully performed its obligations under such options and plaintiff at no time abandoned its rights under such option agreements. The variance in the realty description of the two easement documents identified as Plaintiff's Exhibits 8 and 9 and the two option agreements, Exhibits 1 and 2, is not sufficient basis for defendant to refuse to execute and deliver to plaintiff such easement documents, and plaintiff is entitled to a decree of specific performance to compel defendant to execute the two easement documents filed April 15, 1974, in the record in this case or the easement documents identified as Plaintiff's Exhibits 8 and 9. Gilbert vs. Port, 28 Ohio St. 276; 49 O. Jur. 2d. 566-570, Secs. 54, 55. By reason of the foregoing determination, assignments of error Nos. 2, 3 and 4 are well taken. For the reasons hereinabove stated defendant-appellee's two assignments of error are not well taken.

Exhibit B

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The record reveals that the trial court found that the opposition to plaintiff's motion to compel discovery was substantially justified and to make an award of expenses would be unjust, and such determination was no abuse of discretion by the trial court in its refusal to impose sanctions upon defendant pursuant to Civ. R. 37 pertaining to the refusal of defendant Holly to answer questions upon the taking of his deposition. Accordingly, assignment of error No. 1 is not well taken. State Automobile Mutual Ins. Co. vs. Chrysler, 36 Ohio St. 2d 151.

Judgment of the Common Pleas Court of Ottawa County is reversed at costs of defendant-appellee, and coming now to enter the judgment which the trial court should have rendered, it is ordered, adjudged and decreed that defendant specifically perform the provisions of the two option agreements by executing the two easement documents on file in the record in this case containing the same legal description as the option agreements, or, in the alternative, that the defendant execute the two easement documents identified as Plaintiff's Exhibits 8 and 9, if the defendant prefers such alternatives, and that the $3,500.00 on deposit at the American Bank in the name of defendant is hereby decreed to be the sole property of defendant in payment of the above described easements. Judgment of the Common Pleas Court denying imposition of sanctions upon defendant under Civ.R. 37 is

affirmed. Cause remanded to said Court for execution of this judgment and for costs.

JUDGES' SIGNATURES

JUDGMENT ENTRY OF THE COURT OF APPEALS OF THE SIXTH APPELLATE DISTRICT OF OHIO

IN THE COURT OF APPEALS OF OTTAWA COUNTY, OHIO

Ohio Edison Company,

C.A. No. 463

Appellant

v.

Trial Ct. No. 18085

John Holly, Jr.,

Appellee

Decision and Journal Entry

Date: February 18, 1975

Motion of defendant-appellee to certify the record of this case to the Ohio Supreme Court for review and final determination for the reason that the judgment of this court rendered February 4, 1975, is in conflict with judgments on the same question by the Court of Appeals of the Fifth and Ninth Appellate Districts, is denied. The cases cited by defendant-appellee in the Motion To Certify, namely, Stanfield vs. Fisher, 37 Ohio App. 2d. 48; Steeg vs. Scharenberg, 20 Ohio App. 2d. 151, and Hotze vs. Erskine, 99 Ohio App 17, are not in conflict with the judgment of this court in this case rendered February 4, 1975.

EXHIBIT C

JUDGMENT ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO

THE SUPREME COURT OF OHIO

1975 Term

Ohio Edison Co.,
Appellee,

to-wit:
April 17, 1975

v.

John Holly, Jr.,
Appellant

No. 75-192

Motion for an Order Directing the Court of Appeals for Ottawa County to Certify Its Record

It is ordered by the Court that this motion is overruled.

JUDGES' SIGNATURES

EXHIBIT D

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

THE SUPREME COURT OF OHIO

1975 Term

Ohio Edison Co.,
Appellee,

to-wit:
April 17, 1975

v.

No. 75-192

John Holly, Jr.,
Appellant

Appeal from the Court of Appeals for Ottawa County, Ohio

This cause, here on appeal as of right from the Court of Appeals for Ottawa County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

JUDGES' SIGNATURES

Exhibit E

OHIO REVISED CODE SECTIONS

163.14 Jury; verdict

In appropriation proceedings the jury shall be sworn to impartially assess the compensation and damages, if any, without deductions for general benefits as to the property of the owner.

The jury, in its verdict, shall assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners. When a building or other structure is on the property appropriated or when a building or other structure is situated partly upon the land appropriated and partly upon adjoining land so that the structure can not be divided upon the line between such lands without manifest injury thereto, the jury, in assessing compensation to any owner of the land, shall assess the value thereof, as part of the compensation. The title to said structure shall vest in the agency which shall have the right to enter upon the adjoining land upon which any part of the structure is located for the purpose of removing said structure therefrom, after deposit in accordance with the verdict. Such removal shall be made within ninety days after taking title to the property appropriated; provided, that the court may extend removal time upon such conditions as the court requires.

The verdict shall be signed by at least three-fourths of the members of the jury.

If a jury is discharged without rendering a verdict, another shall be impaneled at the earliest convenient time and shall make the inquiry and assessment.

1723.01 Power to enter upon and appropriate land.

If a company is organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water; for constructing and maintaining canals, locks, and raceways to regulate and carry such head of water to any plant or powerhouse where electricity is to be generated; for erecting and maintaining lines of poles on which to string wires or cables to carry and transmit electricity; for transporting natural or artificial gas, petroleum, coal or its derivatives, water, or electricity, through tubing, pipes, or conduits; or by means of wires, cables or conduits; for storing, transporting, or transmitting water, natural or artificial gas, petroleum, or coal or its derivatives, or for generating and transmitting electricity; then such company may enter upon any private land to examine or survey lines for its tubing, pipes, conduits, poles, and wires, or to examine and survey for a reservoir, dams, canals, raceways, a plant, or a powerhouse, and to ascertain the number of acres overflowed by reason of the construction of such dams, and may

appropriate so much of such land, or any right or interest therein, as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant, powerhouse, storage yards, wharves, bridges, workshops, receiving and delivery structures or facilities, pumping stations, and any other buildings, structures, appliances, or facilities necessary to the purposes of such companies, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such lines.

1723.02 Acquiring right to appropriate.

The appropriation referred to in section 1732.01 of the Revised Code shall be made in accordance with sections 163.01 to 163.22 of the Revised Code. So far as the rights of the public therein are concerned, the director of transportation or other state official having supervision or control as to state roads, the board of county commissioners as to county roads, the board of township trustees as to township roads, and the legislative authority of municipal corporation as to streets and alleys in their respective jurisdiction may grant to such companies, subject to such regulations and restrictions as such public officials prescribe, the right to lay such tubing, pipes, conduits, poles, and wires therein. But the right to appropriate for any

of the purposes specified in such section does not extend to the erection of any tank, station, reservoir, or building, or lands, therefor, or to more than one continuous pipe, conduit, or tubing, or lands therefor, in or through a municipal corporation, unless the legislative authority first consents thereto.

CONSTITUTION OF THE STATE OF OHIO

Article I, Section 19. Private property inviolate, exception.

Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money: and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Article XIII, Section 5. Right of way.

No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money,

or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation: which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

CONSTITUTION OF THE UNITED STATES

Fifth Amendment

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment

Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

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the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OPTION

Parcel No. 5

For and in consideration of twenty and no/xx Dollar ($20.00) in hand paid, receipt of which is hereby acknowledged, the undersigned Grantor(s) hereby give and grant unto Ohio Edison Company, an Ohio corporation, the Grantee, the right and option to purchase at any time on or before the 31st day of March, 1973, an easement and right of way with certain rights and privileges for lines for the transmission and distribution of electric current, including telephone and telegraph, upon, over, under and across the following described premises, situated in the Township of Portage, County of Ottawa, State of Ohio, being a part of Section 5, Township 6 North, Range 17 East.

The approximate location of said right of way is as follows:

An irregular-shaped parcel of land bounded on the east by Grantors' easterly property line, bounded on the southeast by the northwesterly limits of an easement granted Ohio Edison Company by John Holly, Sr. on March 25, 1955 and recorded in Volume 178, Page 230 of the Ottawa County Deed Records, bounded on the south by Grantors' southerly property line, and bound ed on the northwest by the northwesterly line of right of way, which northwesterly line of right of way is described as follows:

The northwesterly line of said right of way

enters Grantors' premises from the land of Howard Dye at a point on said Grantors' easterly property line approximately 29 rods northerly from Grantors' southeast corner; thence from this point in a general south-westerly direction across Grantors' premises approximately 30 rods to a point on Grantors' southerly property line approximately 4 rods westerly from Grantors' southeast corner where said line crosses to the lands of John Holly, Jr.

The exact location of said right of way is to be designated by Grantee after its final surveys are made and in any event before the construction of said lines shall be commenced.

The undersigned Grantor(s) agree, if this option becomes effective by acceptance according to the terms hereof, to permit and convey to Grantee the right to erect, inspect, operate, replace, relocate, repair, patrol and permanently maintain upon, over, under and along the above described right of way across said premises, all necessary structures, wires, cables and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, including telephone and telegraph, and the right of reasonable ingress and egress upon, over and across said premises for access to and from said right of way, and the right to trim, cut, remove or control by any other means at any and all times such trees,

limbs and underbrush within or adjacent to said right of way as may interfere with or endanger said structures, wires or appurtenances or their operation.

The undersigned Grantor(s) reserve the right to use the ground between said structures and beneath said wires, provided that such use does not interfere with or obstruct the rights herein granted, and the Grantor(s) agree that no building, obstruction or impediment of any kind shall be placed within said right of way or between said structures or beneath said wires without prior written approval of the Grantee.

The Grantee will repair or replace all fences, gates, lanes, driveways. drains and ditches damaged or destroyed by it on said premises or pay Grantor(s) for all damage to fences, gates, lanes, driveways, drains, ditches, crops and stock on said premises caused by the construction or maintenance of said lines.

All of the provisions contained in this option shall, on or before the date first herein before written and upon acceptance by Grantee, be incorporated into a final instrument of conveyance, with release of dower, provided Grantee pays or tenders to Grantor(s) or their heirs, executors, administrators or assigns, in full satisfaction of the rights optioned, the sum of Dollars ($400.00) which Grantor(s) agree to accept in such satisfaction and which

shall be paid or tendered before the construction of said lines shall be commenced. Such tender or payment may be made to Grantor(s) or to their heirs, executors, administrators or assigns, or such sum may be deposited by Grantee to their credit in The American Bank, Port Clinton, Ohio, which is hereby authorized to accept same and to acknowledge receipt thereof, and such tender, payment or deposit shall constitute a full compliance of Grantee's obligations hereunder, and Grantor(s) shall forthwith execute and deliver a final instrument of conveyance, with release of dower, to Grantee, its successors and assigns. Upon such tender, payment or depost being made, Grantee, its successors and assigns, shall have the immediate right to go upon siad premises for the purpose of constructing, maintaining and operating said lines.

The Grantor(s) represent that they are the owners of the premises herein described.

The easements, benefits and burdens hereby optioned shall inure to the benefit of and be binding upon the parties hereto, their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF I, the Grantor(s) hereunto set my hand this 4th day of April, 1972.

/s/ D.R. Campbell /s/ John Holly, Jr.

OPTION

Parcel No. 6

For and in consideration of twenty---- no/---Dollar ($20.00) in hand paid, receipt of which is hereby acknowledged, the undersigned Grantor(s) hereby give and grant unto Ohio Edison Company, an Ohio corporation, the Grantee, the right and option to purchase at any time on or before the 31st day of March, 1973, an easement and right of way with certain rights and privileges for lines for the transmission and distribution of electric current, including telephone and telegraph, upon, over, under and across the following described premises, situated in the Township of Portage, County of Ottawa, State of Ohio, being a part of Sections 5 and 8, Township 6 North, Range 17 East.

The approximate location of said right of way is as follows:

CROSSING NO. 1

A strip of land abutting and parallel to an existing easement granted Ohio Edison Company by John Holly, Jr. on March 25, 1955 and recorded in Volume 178, Page 234 of the Ottawa County Deed Records, said strip of land being 35 feet wide, 25 feet on the northwesterly side and to the northwesterly limits of said existing easement on the southeasterly side of a survey line, which survey line of right of way is described as follows:

The survey line of said right of way enters Grantor's premises from the land of John Holly, Jr., et al, at a point on said Grantor's upper northerly property line approximately 34 rods easterly from Grantor's upper northwest corner; thence from this point in a general southwesterly direction across Grantor's premises approximately 33 rods to a point on the northwesterly limits of State Route 2 right of way; thence continuing in said southwesterly direction across said State Route 2 right of way approximately 29 rods to a point on the southeasterly limits of State Route 2 where said survey line re-enters Grantor's premises; thence continuing in said southwesterly direction across Grantor's premises approximately 39 rods to a point on Grantor's upper southerly property line, said line being the southerly line of Section 5, approximately 51 rods westerly from Grantor's upper southeast corner, said corner being the southeasterly corner of Section 5, where said line crosses to the lands of B. E. and B. A. Heilman.

(CONT'D)

The exact location of said right of way is to be designated by Grantee after its final surveys are made and in any event before the construction of said lines shall be commenced.

The undersigned Grantor(s) agree, if this option becomes effective by acceptance according to the terms hereof, to permit and convey to Grantee the right to erect, inspect, operate,

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replace, relocate, repair, patrol and permanently maintain upon, over, under and along the above described right of way across said premises, all necessary structures, wires, cables, and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, including telephone and telegraph, and the right of reasonable ingress and egress upon, over and across said premises for access to and from said right of way, and the right to trim, cut remove or control by any other means at any and all times such trees, limbs and underbrush within or adjacent to said right of way as may interfere with or endanger said structures, wires or appurtenances or their operation.

The undersigned Grantor(s) reserve the right to use the ground between said structures and beneath said wires, provided that such use does not interfere with or obstruct the rights herein granted, and the Grantor(s) agree that no building, obstruction or impediment of any kind shall be placed within said right of way or between said structures or beneath said wires without prior written approval of the Grantee.

The Grantee will repair or replace all fences, gates, lanes, driveways, drains and ditches damaged or destroyed by it on said premises or pay Grantor(s) for all damage to fences, gates, lanes, driveways, drains, ditches, crops and stock on said premises

caused by the construction or maintenance of said lines.

All of the provisions contained in this option shall, on or before the date first herein before written adn upon acceptance by Grantee, be incorporated into a final instrument of conveyance, with release of dower, provided Grantee pays or tenders to Grantor(s) or their heirs, executors, administrators or assigns, in full satisfaction of the rights optioned, the sum of Dollars ($3100.00), which Grantor(s) agree to accept in such satisfaction and which shall be paid or tendered before the construction of said lines shall be commenced. Such tender or payment may be made to Grantor(s) or to their heirs, executors, administrators or assigns, or such sum may be deposited by Grantee to their credit in The American Bank, Port Clinton, Ohio, which is hereby authorized to accept same and to acknowledge receipt thereof, and such tender, payment or depost shall constitute a full compliance of Grantee's obligations hereunder, and Grantor(s) shall forthwith execute and deliver a final instrument of conveyance, with release of dower, to Grantee, its successors and assigns. Upon such tender, payment or deposit being made, Grantee, its successors and assigns, shall have the immediate right to go upon said premises for the purpose of constructing, maintaining and operating said lines.

The Grantor(s) represent that they are

owners of the premises herein desc

CROSSING NO. 2

A strip of land 50 feet wide, 25 feet on each side of a center line, which center line of right of way is described as follows:

The center line of said right of way enters Grantor's premises from the land of B. E. and B. A. Heilman at a point on said Grantor's lower easterly property line approximately 101 rods northerly from Grantor's lower southeast corner, said corner being in the center of Lockwood Road; thence from this point in a general southwesterly direction across Grantor's premises approximately 81 rods to an angle point where said survey line angles to the right approximately 23 degrees; thence from this point in a general westerly direction approximately 5 rods to a point on Grantor's lower westerly property line approximately 72 rods northerly from Grantor's southwest corenr, said corner being in the center of Lockwood Road, where said line crosses to the lands of H. and B. Johannsen.

Together with the right to install guy wires and anchors within or adjacent to the right of way herein granted wherever necessary.

The easements, benefits and burdens hereby optioned shall inure to the benefit of and be binding upon the parties hereto, their respective heirs, executors, administrators,

successors and assigns.

IN WITNESS WHEREOF I, the Grantor(s) hereunto set my hand this 4th day of April, 1972.

/s/ D.R. Campbell /s/ John Holly, Jr.

EASEMENT

KNOW ALL MEN BY THESE PRESENTS

That I, JOHN HOLLY, JR., aka John Holly, an unmarried person, claiming title by virtue of insturments recorded in Volume 206, Page 353; Volume 203, Page 503; Volume 203, Page 505; Volume 119, Page 548; Volume 115, Page 262; Volume 166, Page 107; Volume 122, Page 666; and Volume 106, Page 349 of the Ottawa County Deed Record, the Grantor, for and in consideration of the sum of Three Thousand Five Hundred Dollars ($3,500.00) and other valuable considerations received to my full satisfaction of OHIO EDISON COMPANY, an Ohio corporation, the Grantee, do hereby grant unto Grantee, its successors and assigns, an easement and right-of-way, with the rights and privileges hereinafter set forth, for the lines for the transmission and distribution of electric current, including telephone and telegraph, upon, over, under and across the following described premises:

Situated in the Township of Portage, County of Ottawa, State of Ohio, being a part of Section 5, Township 6 North, Range 17 East.

PARCEL NO. 1

An irregular-shaped parcel of land bounded on the east by the Grantor's easterly property line, bounded on the southeast by the northwesterly limits of an easement granted Ohio Edison Company by John Holly, Sr.

on March 25, 1955 and recorded in Volume 178, Page 230 of the Ottawa County Deed Records, bounded on the south by Grantor's southerly property line, and bounded on the northwest by the northwesterly line of right of way, which northwesterly line of right of way is described as follows:

The northwesterly line of said right of way enters Grantor's premises from the land of H. Dye at a point on said Grantor's easterly property line approximately 493 feet northerly from Grantor's southeast corner; thence from this point in a general northwesterly direction across Grantor's premises approximately 496 feet to a point on Grantor's southerly property line approximately 41 feet westerly from Grantor's aforesaid southeast corner where said line crosses to the lands of J. Holly, Jr.

A strip of land abutting and parallel to an existing easement granted Ohio Edison Company by John Holly, Jr. on March 25, 1955 and recorded in Volume 178, Page 234 of the Ottawa County Deed Records, said strip of land being 35 feet wide,

25 feet on the northwesterly side and to the northwesterly limits of said existing easement on the southeasterly side of a survey line, which survey line of right of way is described as follows:

The survey line of said right of way enters Grantor's premises from the land of J. Holly, Jr. at a point on said Grantor's upper northerly property line approximately 576 feet easterly from Grantor's upper northwest corner; thence from this point in a general southwesterly direction across Grantor's premises approximately 542 feet to a point on the northwesterly limits of State Route 2 right of way; thence continuing in said southwesterly direction across said State Route 2 right of way approximately 492 feet to a point on the southeasterly limits of said State Route 2 where said survey line re-enters Grantor's premises; thence continuing in said southwesterly direction across Grantor's premises approximately 648 feet to a point on Grantor's upper southerly property line, said line being the southerly line of Section 5, approximately 860 feet westerly from Grantor's upper southeast corner,

said corner being the southeasterly corner of Section 5, where said line crosses to the lands of B.E. and B.A. Heilman.

CROSSING No. 2

A strip of land abutting and parallel to and existing easement granted Ohio Edison Company by an instrument recorded in Volume 3, Page 631 of the Ottawa County Records, said strip of land being approximately 35 feet wide, 25 feet on the northwesterly side and to the northwesterly limits of said existing easement on the southeasterly side of a survey line, which survey line of right of way is described as follows:

The survey line of said right of way re-enters Grantor's premises from the land of B.E. and B.A. Heilman at a point on said Grantor's lower easterly property line approximately 1,627 feet northerly from Grantor's lower southeast corner, said corner being in the center of Lockwood Road; thence from this point in a general southwesterly direction across Grantor's premises approximately 58 feet to an angle point where said survey line angles to the right approximately 7 degrees;

thence from this point in a general southwesterly direction approximately 1, 183 feet to an angle point where said survey line angles to the right approximately 21 degrees; thence from this point in a general westerly direction as a strip of land being 25 feet on the northerly side and to the northwesterly limits of Grantee's aforesaid existing easement on the southerly side of said survey line approximately 16? feet to a point on Grantor's lower westerly property line approximately 1, 178 feet northerly from Grantor's southwest corner, said corner being in the center of Lockwood Road, where said line crosses to the lands of H. and B. Johannsen.

Together with the right to install guy wires and anchors within or adjacent to the right of way herein granted wherever necessary.

The easement and rights herein granted shall include the right to erect, inspect, operate, replace, relocate, repair, patrol and permanently maintain upon, over, under and along the above described right of way across said premises all necessary structures, wires, cables and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric

current, including telephone and telegraph, and the right of reasonable ingress and egress upon, over and across said premises for access to and from said right of way, and the right to trim, cut, remove or control by any other means at any and all times such trees, limbs, and underbrush within or adjacent to said right of way as may interfere with or endanger said structure, wires or appurtenances, or their operation.

The Grantor reserve the right to use the ground between said structures and beneath the said wires, provided that such use does not interfere with or obstruct the rights herein granted, and the Grantor agree that no building, obstruction or impediment of any kind shall be placed within said right of way or between said structures or beneath said wires without prior written approval of the Grantee.

The Grantee will repair or replace all fences, gates, lanes, driveways, drains and ditches damaged or destroyed by it on said premises or pay Grantor for all damage to fences, gates, lanes, driveways, drains, ditches, crops and stock on said premises caused by the construction or maintenance of said lines.

TO HAVE AND TO HOLD the said easement, rights and right of way and its appurtenances to said Grantee and to its successors and assigns forever; and the Grantor represents that they are the lawful

owners of said premises and have full power to convey the rights and easements herein granted, that the same are free and clear of all encumbrances and that they will warrant and defend the same against all lawful claims and demands whatsoever, except current taxes and assessments not yet due and payable, easements, restrictions and reservations of record, and zoning ordinances, if any, and for valuable consideration the Grantor does each hereby remise, release and forever quit-claim unto Grantee, its successors and assigns, all their right and expectancy of dower in the above described right of way.

IN WITNESS WHEREOF, I have hereunto set my had as of the ____ day of _____, 197____.

Signed in the presence of:

_____ _____

_____

Before me, A Notary Public in and for said County and State, personally appeared JOHN HOLLY, JR. an unmarried person aka JOHN HOLLY,
who acknowledged that he did sign the foregoing instrument and the same is his free act and deed.

Option Rods	=	Feet	Easement Feet	Difference Feet
29		478.5	493	14.5
30		495.0	496	1.0
4		66.0	41	25.0
		Parcel 2, Crossing #1		
34		561.0	576	15.0
33		544.5	542	2.5
29		478.5	492	13.5
39		643.5	648	5.5
51		841.5	860	18.5
		Parcel 2, Crossing #2		
		50	35	15.
101		1666.5	1627	39.5
81		1336.5	58	1278.5
5		82.5	169	88.5
72		1188.0	1178	2.0

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS OF OTTAWA COUNTY, OHIO

IN THE COURT OF COMMON PLEAS
OF OTTAWA COUNTY, OHIO

Gladys Farmer, et al.,
Plaintiffs

Case No. 17402
Filed June 28, 1972

v.

The Toledo Edison Company,
Defendant

JUDGMENT

This matter came on to be heard on the pleadings, the evidence and arguments of counsel.

The Court, being fully advised of the premises, finds upon the issues set forth in the separate findings of fact and conclusions of law filed herein and finds that judgment should be entered in favor of Plaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the easement instrument executed by Plaintiffs Gladys and Walter Farmer to Defendant The Toledo Edison Company, which instrument is recorded at Deed Book 238, page 630, of the Deed Records in the Recorder's office of Ottawa County, Ohio, is hereby set aside, cancelled and vacated and the Recorder of Ottawa County is instructed to cancel the same of record.

It is further ordered that Defendant, The Toledo Edison Company, either properly

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negotiate with the Plaintiffs or that this cause be set for trial.

Exceptions to Defendant. Costs to Defendant.

IN THE COURT OF COMMON PLEAS
OF OTTAWA COUNTY, OHIO

Gladys Farmer, et al.,
Plaintiffs

No. 17402

v.

The Toledo Edison Company,
Defendant

SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW
FILED June 28, 1972

This matter was duly assigned for trial and the Court having been requested to make a separate finding of facts and conclusions of law, finds the following facts:

That the plaintiffs gave to the defendant a deed for an easement across their property for the sum of $125.00.

The Court has received from the parties their proposed separate findings of fact and conclusions of law. After carefully reading and re-reading said findings the Court is unable to adopt either for the reason that the findings of facts in both of the suggested ones are not supported by evidence which the Court can

believe. However, the Court does find that an easement was given, as stated above, and that the plaintiffs received $125.00 therefor.

The Court further finds that an independent appraiser fixed the value of the easement and damage at many times higher than the $125.00, to-wit:

The Court further finds that the negotiator, so-called, was sent out with a sum certain to be paid, that the negotiator had no more knowledge of the property than any other person, that he had no appraisement given by the company and any statement made was without any foundation as to value and/or damage. The Court does find that he made a statement that suit would be brought unless the property was purchased.

The Court further finds that the plaintiffs herein gave some credence to what was said by the negotiator.

The Court further finds that the Toledo Edison had the power of condemnation and that the plaintiffs were bound to accept what a jury would find.

Conclusions of Law

It seems to this Court, while he can find no decisions to substantiate what he says, that a utility company should be compelled to have an appraisement made and a knowledge of the value and effect on the easement when they send people out to negotiate and that the Toledo Edison pay a price, at least a fair

price, for the reasons that they are not standing on an equal basis with the seller, and that they cannot deal on a willing buyer and seller basis because the landowner is not a willing seller.

Therefore the Court finds that the deed should be set aside and that either the Toledo Edison properly negotiate or the cause be set for trial.

Judgment entry to be prepared for attorney for the plaintiffs and filed with the Court.

Exceptions saved to the defendant.

Q. But did Mr. Campbell tell you that damages would be paid for destruction that took place to your crops and things during the time of construction?
A. He mentioned something like that. He says, "We'll -- when we damage anything, we'll pay for it."
Q. Is that what you had in mind as far as damages were concerned?
A. No, I had in mind I wanted damages before they come in there.
Q. What damages?
A. Because I can't go by that when they're already in there and they damage my crops, you can't get anything off of them.
Q. Well, what damages did you have in mind before they came in there?
A. Well, I can't sell the place over again; and I can't build under it. That's my damages. It's a valuable piece of land.
Q. You didn't consider the $3500.00 damages?
A. Now, that's the price of going through there.
Q. That's the price of the easement?
A. Yeah.

NEWSPAPER ARTICLES

The Toledo Blade, Toledo, Ohio, August 29, 1973:

4 NUCLEAR GENERATING UNITS PLANNED ALONG LAKE ERIE BY TOLEDO EDISON, 4 OTHER FIRMS
Program to Run For 10 years, Cost $3 Billion

Four new nuclear generating units will be built on or near Lake Erie in northwestern Ohio as part of a $3 billion, 10 year construction program announced late Tuesday by a five-company power pool in Ohio and Pennsylvania that includes Toledo Edison Company.....

The Plain Dealer, Cleveland, Ohio, Tuesday, September 4, 1973:
7 reactors planned amid utility-environmentalist dispute
NORTHERN OHIO BECOMING NUCLEAR POWER HOTBED
By William D. McCann

Northern Ohio is to become one of the major centers of nuclear electric power generation in the nation within a decade under current plans by several power companies...

News Herald, Port Clinton, Ohio -
Oak Harbor, Ohio, August 29, 1973

PLAN TWC NEW DAVIS-BESSE PLANTS

Plans for the construction of four more nuclear power plants and a coal-fired generating plant in northern Ohio and western Pennsylvan were disclsoed last night by CAPCO (Central Area Power Coordination) group, and two more plants at the Davis-Besse site are included....

PROPOSITIONS OF LAW

Proposition of Law No. 1:

Where a corporation having the power of eminent domain obtains the signature of a property owner to an option to grant a right of way for high voltage electric transmission line, if the option is enforceable, the constitutional and statutory safeguards regarding eminent domain apply.

Proposition of Law No. 2:

Where a corporation obtains the signature of a property owner to an agreement to grant a right of way for a high voltage electric transmission line, under Article XIII Section 5 of the Ohio Constitution, the Fifth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution, the only consideration which is adequate is full consideration and if the land value is stated to be $3500.00, a payment of $20.00 is insufficient consideration and the agreement is unenforceable.

Proposition of Law No. 3:

" Full" compensation as required by Article XIII, Section 5 of the Ohio Constitution and " just" compensation as required by the Fifth Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution have as their constituent components (1) payment for the land taken and (2) payment for reduction in value of remaining land.

§163.14, Ohio Revised Code; Van Horn v. Iowa Public Service Company, 182 NW 2d 365 (1970); Georgia Power v. Sinclair, 176 SE 2d 639 (1970); Gulf States Utilities Company v. Robbin, 237 SO 2d 422 (1970); Central Louisiana Electric Company v. Fontenot, 159 SO 2d 738 (1964).

Proposition of Law No. 5:

Where a corporation obtains the signature of a property owner to an agreement for a high voltage electric transmission line, where there is no discussion and no release of the owner's right to damage to the remaining land, the utility company may not defeat the owner's right to damage to residue, and if the trial court orders the owner to specifically perform the option to convey a right of way, the owners are entitled to a jury trial to determine the damage, if any, to the remaining land, pursuant to the requirement of "full" compensation under Article XIII, Section 5, of the Ohio Constitution and the Fifth Amendment and the requirement of due process

under the Fourteenth Amendment of the Constitution of the United States.
49 O Jur 2d 617, In Re Appropriation, 25 O App 2d 169 (Court of Appeals, Meigs County 1970); Cannon v. Texas, 473 SW 2d 325 (Court of Civil Appeals Houston 1st District 1971).

Proposition of Law No. 6:

Where a corporation obtains the signature of a property owner to an agreement to grant a right of way for a high voltage electric transmission line, and the agreement form contains no discussion of and no release of the owner's right to damage to residue, said option violates the owner's constitutional right to damage to residue and cannot be enforced by specific performance.
City Stores v. Ammerman, 266 Fed. Supp. 266 (D. D. C), affirmed 394 Fed 2d 95 (CADC); Gould v. Gallam, 127 Cal App 2d 1, 273 P2d 93; Kamo Electric Co-op v. Cushard, 455 SW 2d 513 (Supreme Court, Missouri 1970); United Gas Pipeline v. Singleton, 241 Southern 2d 93 (Louisiana 3rd Circuit Court of Appeals 1970)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. _____

John Holly, Jr.,
Petitioner
-v-
Ohio Edison Company,
Respondent

AFFIDAVIT -- PROOF OF SERVICE

State of Ohio)
Ottawa County) ss

Thomas L. Corogin, being first duly sworn according to law, deposes and says that he is the Counsel for Petitioner in the above captioned matter, and that on the 12 day of July, 1975, he mailed by first class mail, postage prepaid, to Mr. Paul C. Moon, Counsel for Respondent herein, 222 E. Second St., Port Clinton, Ohio 43452, a copy of the Petition for a Writ of Certiorari to the Supreme Court of Ohio. 3 copies mailed.

Thomas L. Corogin

Sworn to before me and subscribed in my presence this 12 th day of July, 1975.

Notary Public -Ohio
Stephen E. Cottrell

Supreme Court, U. S.
FILED
AUG 28 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-77

JOHN HOLLY, JR.,

Petitioner,

vs.

OHIO EDISON COMPANY,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

BRIEF FOR RESPONDENT IN OPPOSITION

PAUL C. MOON
222 East Second Street
Port Clinton, Ohio 43452
Phone: (419) 732-3145
Attorney for Respondent

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

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In The

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On Petition for Writ of Certiorari
To the Supreme Court of Ohio

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. An Option for the purchase of real estate, freely entered into between two (2) parties competent to contract, containing a definite and certain description of the real estate to be conveyed, is a contract for the conveyance of real estate and may be specifically performed. (*City Stores Company* v. *Ammerman,* U. S. District Court, District of Columbia, 1967, 266 F. Supp. 766.)

2. In an action for the specific performance of a contract for the purchase of real estate, where one party to the

contract is vested with the power of eminent domain, the ability of that party to exercise the power of eminent domain does not constitute an adequate remedy at law thus rendering the contract unenforcible in equity. (*Sargent* v. *Cincinnati,* 110 Ohio St. 144 at 457, 1910.)

3. In an action for specific performance of a contract to sell real property, parol evidence may not be admitted to furnish or correct a description of the property in the contract. (*Schmidt et al.* v. *Weston,* 150 Ohio St. 293, 1941, approved and followed.)

4. Parol evidence may be resorted to for the purpose of applying the description contained in a writing to a definite piece of property and to ascertain its location on the ground, but never for the purpose of supplying deficiencies in a description otherwise so incomplete or incorrect as not to identify the land. The description must be in itself capable of application to something definite before parol testimony can be admitted to identify any property as the thing described. (*Schmidt* v. *Weston,* 150 Ohio St. 293, 1941, approved and followed.)

5. A contract for the sale of land must definitely point out the particular land to be conveyed or must furnish means of identifying it with certainty. (*Schmidt, et al.* v. *Weston,* 150 Ohio St. 293, 1941, approved and followed.)

STATEMENT OF THE CASE

Respondent, Ohio Edison Company, filed its Complaint in the Court of Common Pleas of Ottawa County, Ohio May 24, 1973 asking for specific performance of two (2) Option Agreements for the conveyance of land executed by Defendant John Holly, Jr., April 4, 1972. Copies of the Option Agreements were attached to the Complaint

as Exhibit A and B, pursuant to Civil Rule 10, and on Exhibits A and B to this Brief. Petitioner's First Answer (Exhibit C) was filed June 7, 1973 and later amended July 26, 1973. On September 14, 1973 Respondent deposed Petitioner and thereafter on December 17, 1973 moved the Court to compel discovery and impose sanctions pursuant to Civil Rule 37. Petitioner next on January 7, 1974 moved for a Protective Order pursuant to Rule 26 and both the Rule 37 Motion of Respondent and the Rule 26 Motion of Petitioner were heard January 30, 1974, but not journalized until July 30, 1974 at which time sanctions were denied.

Respondent filed its Motion for Summary Judgment February 12, 1974 together with an Affidavit, Memoranda of Law and two (2) depositions. Hearing was had March 22, 1974 in the lower Court on the Motion for Summary Judgment and thereafter in an Opinion filed March 29, 1974 (Exhibit D), the Court granted judgment to Respondent. On May 6, 1974 the lower Court reversed itself and entered judgment denying the Motion for Summary Judgment, Exhibit E.

Petitioner filed a Second Amended Answer May 14, 1974 and the case was tried to the Court without jury July 2, 1974. At the conclusion of Respondent's evidence, judgment was entered for Petitioner denying specific performance and sanctions pursuant to Rule 37, Exhibit F. From this latter Order of the Court entered July 30, 1974 and from the Court's earlier Order of May 6, 1974 denying Summary Judgment, respondent appealed to the 6th District Ohio Court of Appeals.

The Court of Appeals on February 4, 1975 reversed the lower Court entering judgment for Plaintiff and ordering the Option Agreements specifically performed, Exhibit G.

Subsequently, the Ohio Supreme Court declined to review the matter properly concluding there were no constitutional questions involved.

STATEMENT OF FACTS

On April 4, 1974 Petitioner-Defendant John Holly, Jr., hereinafter called Holly, entered into two (2) separate Option Agreements with Respondent-Plainitff, Ohio Edison Company, hereinafter called Edison. A consideration of Twenty Dollars ($20.00) was then paid Holly for each Option, and Edison agreed to pay Holly Four Hundred Dollars ($400.00) and Three Thousand One Hundred Dollars ($3,100.00) respectively upon exercise of the Options. The said Agreements granted Edison the right and option to purchase certain rights-of-way and privileges in Portage Township, Ottawa County, Ohio on or before March 31, 1973 by depositing to the account of Holly at the American Bank, Port Clinton, Ohio, the total sum of Three Thousand Five Hundred Dollars ($3,500.00). Holly read and signed the Option Agreements April 4, 1974. He dictated the ultimate consideration to be paid upon conveyance, as stated in each Option Agreement. On March 26, 1974 Edison exercised the two (2) Options pursuant to the terms thereof by depositing Three Thousand Five Hundred Dollars ($3,500.00) to the account of Holly at the American Bank, Port Clinton, Ohio. Holly refused to perform as agreed and Edison commenced an action in the Court of Common Pleas seeking to have the two (2) Option Agreements specifically performed.

Edison's Motion for Summary Judgment filed February 2, 1974 was argued to the Court March 22, 1974 and on March 29, 1974 the Court filed its Opinion granting Summary Judgment to the Respondent. Edison then tendered to Holly's Counsel easements to be executed in pursuance of the ordered Summary Judgment, Exhibit H. Holly refused. Edison then tendered into Court easements drawn in strict pursuance of the Court's ordered Summary Judgment and containing the same real estate descriptions contained in the original Option Agreements, Exhibit I, compare Exhibits A and B. On May 6, 1974 the Court denied Summary Judgment and the matter was tried July 2, 1974.

Testimony adduced at the trial of July 2, 1974 developed without contradiction the following facts: (See testimony of Holly, Exhibit J)

1. Holly was the owner of the optioned land.

2. Holly was familiar with utility companies, right of way agents and their procedures.

3. Holly demanded and got his price for the easements.

4. There is no suggestion that Holly was ever subjected to duress, fraud or misrepresentation.

5. Holly read, understood and signed the Option Agreements.

6. Holly was never denied the right to consult with Counsel nor did he seek that right.

7. Holly was willing to execute the easements when presented to him.

8. The descriptions contained in the two (2) Options, Exhibits A and B, were definite and could be specifically located. (See testimony of Larry G. Koehler, Exhibit K)

9. The descriptions contained in the two (2) easements, Exhibits H and I, were definite and could be specifically located, Exhibit K.

10. The Option descriptions called for greater total land than did the easement descriptions, Exhibit K.

11. While a variance existed between the Option and easement descriptions, the only variance was in width of the easement sought and not in length thereof. Exhibit K.

ARGUMENT

The Five (5) Questions presented by Respondent herein are the central propositions of law applicable to this case. Those Questions asserted by Petitioner are born of the fantasy that any person contracting with a corporate or political entity vested with the power of eminent domain may at his option avoid an otherwise enforcible contract for the sale of real estate and require the said corporate or political entity to proceed under eiminent domain procedures. Long and arduous research divines not one bit of authority, anywhere, for such a fantasy. None exists. Petitioner cites none. Those authorities cited by Petitioner either do not establish the propositions for which they are offered, or they establish the opposite.

It was never intended that the eminent domain provisions of the Ohio Constitution, Article XIII, § 5, take precedence over the prohibition against impairment of contracts, Article II, § 28. Appropriation and purchase by contract are two (2) separate things. They do not overlap; one does not negate the other.

Petitioner made his own bargain, set his own price, did not want the assistance of Counsel, nor was he refused the same. A valid bargain was struck long before the fortuitous appearance of Counsel and cannot be set aside merely because of Counsel.

Petitioner asserts at Page 6 of his Memorandum that there was a threat of eminent domain. That is a gross misrepresentation of the evidence. The testimony of the Petitioner clearly establishes the willingness of Petitioner to bargain, his active participation to the extent of dictating consideration, and a total lack of duress, fraud, misrepresentation or threat.

The whole concern of Petitioner over damages was a concern for subsequent or speculative damages. Damage to the residue is within the original contract price. The Options provide for repair and replacement for damages during construction. Such damages are not part of the purchase price, but only arise at the time of injury. When a person sells an easement he does not reserve the issue of "Damage to residue." He sells all his interest for a price. "Damage to residue" is a theory founded in appropriation laws; it does not apply to private contracts. Appropriation and sale are not the same.

Finally, the testimony of Larry G. Koehler, Registered Surveyor, Exhibit K, does not furnish or correct a description, but within the tolerances of *Schmidt, et al.* v. *Weston*, applies the description already contained in the writing and locates it on the ground. A Registered Surveyor is qualified to say: a description is certain and I was able to locate and plat the land using the description as it existed. That is the sum and substance of his testimony. To apply the theory propounded by Defendant, would keep all Registered Surveyors off witness stands forever. The testimony of the Surveyor is not objectionable, *nor did Defendant ever object to such testimony.* Admittedly, there was a variance between the Option and the easement as finally drawn. That is in the nature of things. How else does one draw an Option description prior to the time

he is permitted to go on the land to survey. Variances are inevitable. Here, the option took more land than the easement as finally drawn. Both Respondent and the Court of Appeals gave Petitioner the choice of conveying by such description as he should elect, but he refused to do either. The descriptions of the Option, and the descriptions contained in the easement as finally drawn were all definite and certain. So testified the Registered Surveyor. The contract obligation to draw the conveyance and then convey was upon the Petitioner – he did neither. Respondent presented Petitioner a choice of using either description – he used neither.

It should also be noted that Defendant's Exhibit J, Comparison, attached to his Petition was *not* evidence received in the lower court, but was originally part of a Motion filed therein. Facts substantiating the recitations thereon were never adduced by Petitioner. The recitations and calculations of Exhibit J are misleading.

CONCLUSION

A clear, convincing and uncomplicated case for specific performance of two (2) Options to sell real estate was established by Plaintiff in the trial court. The efforts of Petitioner to transform the matter into an appropriation case with constitutional overtones constitute an attack upon the rights of persons freely to contract. Thus, the right to contract, if anything, becomes the question before the the Court, not the supposed public interest and constitutional questions presented by Petitioner. The matters presented to this Court in Briefs and Exhibits demonstrate a classic real estate dispute between persons competent to contract, justly resolved in the Ohio Court of Appeals.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PAUL C. MOON

MOON, MOON & NOBLITT

222 East Second Street
Port Clinton, Ohio 43452
Phone: (419) 732-3145

Attorneys for Respondent

APPENDIX

EXHIBIT A

PARCEL No. 5

For and in consideration of Twenty Dollars ($20.00) in hand paid, receipt of which is hereby acknowledged, the undersigned Grantor (s) hereby given and grant unto Ohio Edison Company, an Ohio corporation, the Grantee, the right and option to purchase at any time on or before the 31st day of March, 1973, an easement and right of way with certain rights and privileges for lines for the transmission and distribution of electric current, including telephone and telegraph, upon, over, under and across the following described premises, situated in the Township of Portage, County of Ottawa, State of Ohio, being a part of Section 5, Township 6 North, Range 17 East.

The approximate location of said right of way is as follows:

An irregular-shaped parcel of land bounded on the east by Grantors' easterly property line, bounded on the southeast by the northwesterly limits of an easement granted Ohio Edison Company by John Holly, Sr. on March 25, 1955 and recorded in Volume 178, Page 230 of the Ottawa County Deed Records, bounded on the south by Grantors' southerly properly line, and bounded on the northwest by the northwesterly line of right of way, which northwesterly line of right of way is described as follows:

The northwesterly line of said right of way enters Grantors' premises from the land of Howard Dye at a point on said Grantors' easterly property line approximately 29 rods northerly from Grantors' southeast corner; thence from this point in a general southwesterly direction across Grantors' premises approximately 30 rods to a point on Grantors' southerly property line approximately 4 rods westerly from Grantors' southeast corner where said line crosses to the lands of John Holly, Jr.

The exact location of said right of way is to be designated by Grantee after its final surveys are made and in any event before the construction of said lines shall be commenced.

The undersigned Grantor (s) agree, if this option becomes effective by acceptance according to the terms hereof, to permit and convey to Grantee the right to erect, inspect, operate, replace, relocate, repair, patrol and permanently maintain upon, over, under and along the above described right of way across said premises, all necessary structures, wires, cables and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, including telephone and telegraph, and the right of reasonable ingress and egress upon, over and across said premises for access to and from said right of way, and the right to trim, cut, remove or control by any other means at any and all times such trees, limbs and underbrush within or adjacent to said right of way as may interfere with or endanger said structures, wires or appurtenances or their operation.

The undersigned Grantor (s) reserve the right to use the ground between said structures and beneath said wires, provided that such use does not interfere with or obstruct the rights herein granted, and the Grantor (s) agree that

no building, obstruction or impediment of any kind shall be placed within said right of way or between said structures or beneath said wires without prior written approval of the Grantee.

The Grantee will repair or replace all fences, gates, lanes, driveways, drains and ditches damaged or destroyed by it on said premises or pay Grantor (s) for all damage to fences, gates, lanes, driveways, drains, ditches, crops and stock on said premises caused by the construction or maintenance of said lines.

All of the provisions contained in this option shall, on or before the date herein before written and upon acceptance by Grantee, be incorporated into a final instrument of conveyance, with release of dower, provided Grantee pays or tenders to Grantor (s) or their heirs, executors, administrators or assigns, in full satisfaction of the rights optioned, the sum of Four Hundred Dollars ($400.00) which Grantor (s) agree to accept in such satisfaction and which shall be paid or tendered before the construction of said lines shall be commenced. Such tender or payment may be made to Grantor (s) or to their heirs, executors, administrators or assigns, or such sum may be deposited by Grantee to their credit in The American Bank, Port Clinton, Ohio, which is hereby authorized to accept same and to acknowledge receipt thereof, and such tender, payment or deposit shall constitute a full compliance of Grantee's obligations, hereunder, and Grantor (s) shall forthwith execute and deliver a final instrument of conveyance, with release of dower, to Grantee, its successors and assigns. Upon such tender, payment or deposit being made, Grantee, its successors and assigns, shall have the immediate right to go upon said premises for the purpose of constructing, maintaining and operating said lines.

The Grantor (s) represent that they are the owners of the premises herein described.

The easements, benefits and burdens hereby optioned shall inure to the benefit of and be binding upon the parties hereto, their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF I, the Grantor hereunto set my hand this 4th day of April, 1972.

/s/ D. R. CAMPBELL
/s/ JOHN HOLLY, JR.

EXHIBIT B

PARCEL No. 6

For and in consideration of Twenty Dollars ($20.00) in hand paid, receipt of which is hereby acknowledged, the undersigned Grantor (s) hereby give and grant unto Ohio Edison Company, an Ohio corporation, the Grantee, the right and option to purchase at any time on or before the 31st day of March, 1973, an easement and right of way with certain rights and privileges for lines for the transmission and distribution of electric current, including telephone and telegraph, upon, over, under and across the following described premises, situated in the Township of Portage, County of Ottawa, State of Ohio, being a part of Sections 5 and 8, Township 6 North, Range 17 East.

The approximate location of said right of way is as follows:

CROSSING No. 1

A strip of land abutting and parallel to an existing easement granted Ohio Edison Company by John Holly, Jr. on March 25, 1955 and recorded in Volume 178, Page 234 of the Ottawa County Deed Records, said strip of land being 35 feet wide, 25 feet on the northwesterly side and to the northwesterly limits of said existing easement on the southeasterly side of a survey line, which survey line of right of way is described as follows:

The survey line of said right of way enters Grantor's premises from the land of John Holly, Jr., et al, at a point on said Grantor's upper northerly property line approximately 34 rods easterly from Grantor's upper northwest corner; thence from this point in a general

southwesterly direction across Grantor's premises approximately 33 rods to a point on the northwesterly limits of State Route 2 right of way; thence continuing in said southwesterly direction across said State Route 2 right of way approximately 29 rods to a point on the southeasterly limits of State Route 2 where said survey line re-enters Grantor's premises; thence continuing in said southwesterly direction across Grantor's premises approximately 39 rods to a point on Grantor's upper southerly property line, said line being the southerly line of Section 5, approximately 51 rods westerly from Grantor's upper southeast corner, said corner being the southeasterly corner of Section 5, where said line crosses to the lands of B. E. and B. A. Heilman.

CROSSING No. 2

A strip of land 50 feet wide, 25 feet on each side of a center line, which center line of right of way is described as follows:

The center line of said right of way enters Grantor's premises from the land of B. E. and B. A. Heilman at a point on said Grantor's lower easterly property line approximately 101 rods northerly from Grantor's lower southeast corner, said corner being in the center of Lockwood Road; thence from this point in a general southwesterly direction across Grantor's premises approximately 81 rods to an angle point where said survey line angles to the right approximately 23 degrees; thence from this point in a general westerly direction approximately 5 rods to a point on Grantor's lower westerly property line approximately 72 rods northerly from Grantor's southwest corner, said corner being in the center of Lockwood Road, where said line crosses to the lands of H. and B. Johannsen.

Together with the right to install guy wires and anchors

within or adjacent to the right of way herein granted wherever necessary.

The exact location of said right of way is to be designated by Grantee after its final surveys are made and in any event before the construction of said lines shall be commenced.

The undersigned Grantor (s) agree, if this option becomes effective by acceptance according to the terms hereof, to permit and convey to Grantee the right to erect, inspect, operate, replace, relocate, repair, patrol and permanently maintain upon, over, under and along the above described right of way across said premises, all necessary structures, wires, cables and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, including telephone and telegraph, and the right of reasonable ingress and egress upon, over and across said premises for access to and from said right of way, and the right to trim, cut, remove or control by any other means at any and all times such trees, limbs and underbrush within or adjacent to said right of way as may interfere with or endanger said structures, wires or appurtenances or their operation.

The undersigned Grantor (s) reserve the right to use the ground between said structures and beneath said wires, provided that such use does not interfere with or obstruct the rights herein granted, and the Grantor (s) agree that no building, obstruction or impediment of any kind shall be placed within said right of way or between said structures or beneath said wires without prior written approval of the Grantee.

The Grantee will repair or replace all fences, gates,

lanes, driveways, drains and ditches damaged or destroyed by it on said premises or pay Grantor (s) for all damage to fences, gates, lanes, driveways, drains ditches, crops and stock on said premises caused by the construction or maintenance of said lines.

All of the provisions contained in this option shall, on or before the date first herein before written and upon acceptance by Grantee, be incorporated into a final instrument of conveyance, with release of dower, provided Grantee pays or tenders to Grantor (s) or their heirs, executors, administrators or assigns, in full satisfaction of the rights optioned, the sum of Three Thousand One Hundred Dollars ($3100.00) which Grantor (s) agree to accept in such satisfaction and which shall be paid or tendered before the construction of said lines shall be commenced. Such tender or payment may be made to Grantor (s) or to their heirs, executors, administrators or assigns, or such sum may be deposited by Grantee to their credit in The American Bank, Port Clinton, Ohio, which is hereby authorized to accept same and to acknowledge receipt thereof, and such tender. payment or deposit shall constitute a full compliance of Grantee's obligations hereunder, and Grantor (s) shall forthwith execute and deliver a final instrument of conveyance, with release of dower, to Grantee, its successors and assigns. Upon such tender, payment or deposit being made, Grantee, its successors and assigns, shall have the immediate right to go upon said premises for the purpose of constructing, maintaining and operating said lines.

The Grantor (s) represent that they are the owners of the premises herein described.

The easements, benefits and burdens hereby optioned shall inure to the benefit of and be binding upon the

parties hereto, their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF I, the Grantor hereunto set my hand this 4th day of April, 1972.

/s/ D. R. CAMPBELL
/s/ JOHN HOLLY, JR.

EXHIBIT C

In The

COURT OF COMMON PLEAS OF
OTTAWA COUNTY, OHIO

Case No. 18085

OHIO EDISON COMPANY,

Plaintiff,

v.

JOHN HOLLY, JR.,

Defendant.

ANSWER OF DEFENDANT

(Filed October 11, 1974)

1. For answer to the Complaint of the Ohio Edison Company, Defendant alleges that said Complaint is a Petition for Appropriation brought under Section 163.01, et seq., of the Ohio Revised Code and that said Petition does not comply with the requirements of Section 163.05 of the Ohio Revised Code in that

(A) The description shown in the Complaint and various exhibits does not show the parcel of land or interest sought to be appropriated as will permit ready identification of the land involved;

(B) There is no statement that such appropriation is necessary;

(C) There is no statement of the purpose of the appropriation;

(D) There is no statement of the estate or interest sought to be appropriated;

(E) There is no statement of the names and addresses of the owners of the real estate involved;

(F) There is no statement showing the requirements of Section 163.04 of the Revised Code have been met;

(G) There is no prayer for appropriation; and

(H) There is no description of the nature of the improvement or use which requires the appropriation, including any specifications, elevations and grade changes in sufficient detail to permit a determination of the nature, extent, and effect of the taking.

2. There is no necessity for the appropriation, since Plaintiff has existing easements over this property which should be utilized without taking more of Defendant's land.

3. For answer to the allegations contained in the "First Cause of Action", Defendant alleges as follows: in answer to paragraph one, Defendant denies entering into any agreement with Ohio Edison Company and alleges there never was a meeting of the minds, even though he did sign some papers which were presented to him by Plaintiff. He never was shown specifications, elevations, grade changes and other plans, even though he made specific requests of Plaintiff for these items. Defendant further represents that Plaintiffs has refused him the right to legal counsel and would not give his attorney the information

requested as provided by statute. Instead, Plaintiff advised Defendant and his attorney that Defendant would either sign the eaement or be taken to Court and forced to give an easement to the Ohio Edison Company. Defendant further says that the Ohio Edison Company attempted to obtain an option from him in order to circumvent the law, particularly Section 5301.01 of the Ohio Revised Code, which section requires two witnesses and an acknowledgement for any instrument conveying an interest in land.

4. Defendant further says that said "agreements" and "exhibits" cannot be the subject of an action for specific performance because this is an appropriation where Defendant is an "unwilling seller" and signed same under threat of legal proceedings and without advice of counsel.

5. Defendant denies the allegations of paragraph two, which state that Plaintiff tendered a purchase price and alleges that Plaintiff never made any tender of any price whatsoever. Defendant further says that Plaintiff did insist that Defendant sign certain papers, but after Defendant and his attorney requested the statutory information as set forth in Section 163.05 of the Ohio Revised Code, Plaintiff refused to furnish the same. Defendant further says he has never been requested to make a conveyance of anything and that Defendant has insisted all along that Plaintiff furnish the necessary and proper information to his attorney so that the matter may be negotiated according to law. Defendant further says that he will not make any conveyance of any land or interest therein until Plaintiff complies with the law of Ohio and conducts serious negotiation with Defendant and the attorney of his choice.

6. Defendant further says that Plaintiff has refused

to allow him to be represented by counsel, contrary to the provisions of the Constitutions of the United States and the State of Ohio and contrary to the customs which have evolved under the concept of private ownership of property.

7. Defendant further says that the three paragraphs listed under "Second Cause of Action" of the Complaint are quoted verbatim from the first cause of action with the exception of the change in the lettering of the exhibits from A to B. Defendant further says that the above answers given to the "First Cause of Action" and to the Complaint in general apply with equal force and effect to the allegations of the "Second Cause of Action" and the same are hereby incorporated by reference.

8. In answer to paragraph three of the "First Cause of Action" and "Second Cause of Action", since Defendant has no reason to go to the American Bank, he has no knowledge whatsoever of any deposit made in any bank by Ohio Edison Company or anyone else and hereby denies the allegations of said paragraphs. Defendant further says that Section 163.06 of the Ohio Revised Code refers to a deposit of money, but says that said deposit must be "with the Court at the time of filing the petition". No deposit has been made in the Court here and Plaintiff has not complied with said section and is not entitled to proceed with the appropriation requested.

9. Defendant further says that Ohio Edison Company has easements and transmission lines on and over real estate owned by him and that any further appropriation is completely unnecessary. Defendant hereby denies the right of Ohio Edison Company to make any appropriation. Defendant further says that the parties have never had the opportunity to discuss the nature, extent and type of

easement or the amount of money to be paid therefor for the reason that the Ohio Edison Company has failed and refuses to negotiate to enable Defendant to receive "full" and "just" compensation as required by the Constitutions of the State of Ohio and the United States.

WHEREFORE, Defendant demands that Plaintiff's complaint be dismissed and that upon dismissal of the same, he be reimbursed for all expenses he incurred as a result of the proceedings of said Plaintiff, including reasonable attorney fees, pursuant to Section 163.21 of the Ohio Revised code, or in the alternative, for the impaneling of a jury to assess his compensation for any rights to be taken in his real estate.

/s/ TOM COROGIN
KLINE AND COROGIN,
Attorneys for Defendant
128 Madison Street
Port Clinton, Ohio 43452
Telephone (419) 734-4142

EXHIBIT D

IN THE COURT OF COMMON PLEAS
OF OTTAWA COUNTY, OHIO

Case No. 18085

OHIO EDISON COMPANY,
Plaintiff,

vs.

JOHN HOLLY, JR.,
Defendant.

OPINION

(Filed March 29, 1974)

Plaintiff's Motion for Summary Judgment allowed as to prayer that defendant perform agreement. No damages alleged in plaintiff's supporting affidavits or proved, and therefore is denied.

Defendant to pay costs. Plaintiff to prepare Judgment Entry.

/s/ DONALD S. WARGOWSKY
Judge

March 29, 1974

EXHIBIT E

IN THE COURT OF COMMON PLEAS
OF OTTAWA COUNTY, OHIO

CASE NO. 18085

OHIO EDISON COMPANY,

Plaintiff,

vs.

JOHN HOLLY, JR.,

Defendant.

JUDGMENT ENTRY

(Filed May 6, 1974)

This court, considering the matters contained in defendant's Motion for New Trial and Reconsideration, hereby rules on each, as follows:

1. Reason "A".

There has been no "Judgment" herein and therefore this reason is premature.

2. Reason "B".

There has been no Trial herein and thus there could not be "error of law occurring at the trial. . . ."

3. Reason "C".

Since no trial has been held yet, no new trial is possible.

4. Reason "F".

Civ. R. 59 (A) (3), (8) and 60 (B) are not applicable

herein because no trial was held, nor any final judgment or order entered.

5. Reasons "D" and "E".

Since the commencement of this case, defendant's theory of defense has been other than stated here. The court cannot find any prior pleading, motion or memorandum of defendant that mentions these instant matters, although a reading of Exhibits A and B should readily show that some degree of ambiguity exists concerning the legal property descriptions, which use the word "approximately" several times, and the sentences on Exhibits A and B which immediately precede and follow said legal property descriptions. Paragraph 1 (A) of defendant's Answer of June 7, 1973 referred specifically to R.C.O. Sec. 163.05 and therefore was later struck. Since defendant did not mention said ambiguities, the court assumed such was the defendant's desire. Thus, the basis for the court's Opinion of March 29, 1974. It should also be noted that defendant did not ask for Summary Judgment in defendant's favor.

Nevertheless, in considering plaintiff's Motion for Summary Judgment, under Civ. R. 56 this court may and should at this time consider the language of Exhibits A and B, finds a sufficient degree of ambiguity concerning the legal property descripton as stated previously herein, consequently finds that a genuine issue as to a material fact exists, that movant is not entitled to judgment as a matter of law, and therefore plaintiff's Motion for Summary Judgment is denied.

Both parties granted 10 days leave to further move or plead.

/s/ DONALD S. WARGOWSKY,
Judge.

EXHIBIT F

IN THE COURT OF COMMON PLEAS
OF OTTAWA COUNTY, OHIO

CASE NO. 18085

OHIO EDISON COMPANY,
PLAINTIFF,

v.

JOHN HOLLY, JR.,
DEFENDANT.

JUDGMENT
(Filed July 30, 1974)

This matter comes on to be heard on the trial on the merits and on Plaintiff's motion filed December 17, 1973, for an award of expenses and attorney fees in connection with said motion to compel discovery.

After Plaintiff's motion was filed Defendant, on January 7, 1974, filed a motion for a protective order under Civ. R. 26-B. Both Plaintiff's motion to compel discovery and Defendant's motion for a protective order were heard at the same time on January 30, 1974. At said hearing said Defendant testified further on cross examination as a supplement to his deposition of September 14, 1973, and filed in this Court on December 27, 1973. The Court's docket entry of January 30, 1974, says, "Motions of Plaintiff and Defendant heard and decided – see judgment

entry." However, no judgment entry appears of record concerning said motions. Nevertheless, because the Court remembers having continued that part of Plaintiff's motion concerning expenses and attorney fees, the Court disposes of these matters as follows:

The matters of which Plaintiff complains in its motion are not instances of failure to obey a court order under Civ. R. 37 (B), but properly come under the last paragraph of Civ. R. 37 (A) (4), Civ. R. 30 (E), and the last sentence of Civ. R. 30 (D). As authority for its decision herein the Court cites *Ward* v. *Hester*, et al. (1973) 36 O.S. 2d 38; *Sexton* v. *Sugar Creek Packing Co.* (1973) 38 O. App. 2d 32; and, *State Auto Mutual* v. *Chrysler Corp.* (1973) 36 O.S. 2d 151.

That part of Plaintiff's motion dealing with Defendant's failure to sign his deposition is answered in the second paragraph of Defendant's memorandum filed December 24, 1973. In any event said matter is not a subject for action under the sanctions of Civ. R. 37; Cive R. 30 (E) outlines the effects of Defendant's not signing.

Concerning the failure of Defendant to answer those questions propounded to him by Plaintiff at Pages 9 through 17 of the deposition of September 14, 1973, the Court finds there was no willfulness or bad faith on Defendant's part and that Defendant immediately answered questions in open court after objections were resolved; that Defendant's motion to limit questions demonstrates the good faith of the objections contained in said Defendant's deposition and are illustrated further by objections made by Defendant in the deposition of Jame E. Lannen taken on February 6, 1974, and filed in this court on February 28, 1974; that the Lannen deposition resulted not of Defendant's refusal to answer questions at the original depo-

sition of Defendant on September 14, 1973, Lannen's deposition resulting because Defendant's answers in court on January 30, 1974, did not provide Plaintiff with necessary information.

This Court further finds that as to Plaintiff's motion of December 17, 1973, said motion being to compel the discovery in question, that this Court granted said motion in part and denied said motion in part. Therefore, as to any possible sanctions, Plaintiff's request for expenses and attorney fees comes under the provisions of the last paragraph of Civ. R. 37 (A) (4) and the latter part of the first paragraph of Civ. R. 37 (A) (4) and this Court finds that the opposition to Plaintiff's motion was substantially justified and that the circumstances makes an award of expenses unjust. Therefore, this Court hereby denies Plaintiff's motion for expenses and attorney fees.

It should be further noted that the last sentence of Civ. R. 30 (D) allows an award under Civ. R. 37, of expenses incurred in relation to a motion to limit examination of a deponent or party, such as was the case here and which the Court granted. The Court notes that Defendant made no request for expenses or attorney fees and accordingly the same is not granted.

This matter also came on to be heard upon the motion of Defendant for a directed verdict or judgment on the evidence at the end of Plaintiff's case.

In interpreting the evidence strongest in favor of the plaintiff, the Court makes the first finding of fact: that the evidence here establishes that Plaintiff did not request of Defendant a conveyance of the description, whatever it may be called, as it was alleged in Plaintiff's complaint; namely, Exhibits A and B, now today entitled 1 and 2; that Plaintiff's demand of Defendant was with the description, or whatever it may be called, as in Exhibits 8 and 9. The Court finds that there are variances as to both length and width in the figures contained therein. Specifically, the Court makes another finding; that there was no evidence shown that Plaintiff requested of Defendant a transfer, as per Exhibits 1 and 2.

Now, these being specific findings of fact, and ruling upon Defendant's motion, the Court finds, first, there having been no request, the issue as to Exhibits 1 and 2, if they can be — whether or not they can be specifically enforced is not before the Court, or, if it was, it has been abandoned by the evidence. But the Court will go one step further. The Court would find that 1 and 2 by their own language and using the term "location" — the Court is well aware of one of these decisions which it had before it today, speaking in terms that the Court cannot supply description, it may only apply a description.

Cannot supply but it can apply. One of the things it can apply is location. Then you go to 1 and 2, you find the word "location" used in both before the typed description and after the typed description. However, in 1 and 2 the first location — word "location" is and does follow the word "described" in part of the legal description. Therefore, the meaning of the word "location" cannot be assumed to be the same in 1 and 2 as the judge used it in the case — the exact case I forget which one it was, but one of those that was cited today and which the Court read.

The Court must interpret the word "location" in Exhibits 1 and 2 as referring to legal description, not a spot on the ground such as was used by the judge in the Supreme Court decision. Therefore, in 1 and 2 the Court finds the description being indefinite and contemplated,

in other words, supplying a description, a future description yet to be made, and since 1 and 2 in a later paragraph, after the typed one, do not preclude an interpretation requiring the necessity of Defendant's consent to a new description. It is the paragraph immediately following the description, type description in 1 and 2. Since that language does not preclude the necessity of Defendant, such a future description may include necessity of the grantor agreeing to the same.

Now, — but all of these latter statements were "but if". "but if" being if Plaintiff has not abandoned 1 and 2 as a claim and if even though they introduce no evidence concerning the request, that the law should be that they don't have to, that a lawsuit in and of itself is sufficient request. All of the courts' rulings follow thereafter.

The evidence today was really concerning your request as to 8 and 9, and in that regard the Court finds sufficient record that it is not in accordance with 1 and 2; the description is not exact in the matters already mentioned, nor as to ingress, egress.

Concerning Plaintiff's oral motion that the Court retain jurisdiction herein to resolve the question involving the $350.00 put by Plaintiff into Defendant's bank account and order Defendant to return the same plus interest, Court hereby grants unto Plaintiff 2 weeks to file a legal brief in support of this Court's jurisdiction and authority to so order in this case; Defendant granted 2 weeks thereafter to file an answer brief; Plaintiff granted 1 week thereafter to file a reply brief, after which said motion will be decided by the Court without oral argument unless for good cause an oral hearing is granted.

It is therefore ordered, adjudged and decreed that De-

fendant be and hereby is granted judgment against Plaintiff and that Plaintiff's demand for specific performance be and hereby is denied.

It is further ordered, adjudged and decreed that Plaintiff is entitled to recover the $3500.00 deposited in Defendant's bank account, plus any interest received by Defendant less any taxes paid thereon by Defendant.

It is further ordered that Defendant's request for expenses and attorney's fees be in the same is hereby denied.

Exceptions to each party; costs to Plaintiff.

/s/ DONALD S. WARGOWSKY,
Judge.

EXHIBIT G

IN THE COURT OF APPEALS
OF OTTAWA COUNTY, OHIO

COURT OF APPEALS NO. 463
TRIAL COURT NO. 18085

OHIO EDISON COMPANY,
APPELLANT,

vs.

JOHN HOLLY, JR.,
APPELLEE.

DECISION & JOURNAL ENTRY

(Filed Decision January 24, 1975)

(Filed Journal Entry February 4, 1975)

DATE: January 24, 1975

The record reveals that plaintiff-appellant obtained two option agreements, identified as Plaintiff's Exhibits 1 and 2, executed by defendant-appellee by which defendant gave and granted to plaintiff a right and option to purchase before March 31, 1973, an easement and right-of-way for electric transmission lines traversing specifically described parcels of real estate owned by defendant. On or about March 22, 1973, and before the expiration of the option period, plaintiff exercised its two options by tendering to defendant the entire purchase price of $3,-

500.00 specified in the two option agreements, and deposited such sum to the account of defendant in the American Bank, Port Clinton, as specified in the option agreement. Simultaneously, and before March 31, 1973, plaintiff tendered to defendant two easement documents identified as Plaintiff's Exhibits 8 and 9, which contained real estate descriptions varying from the realty descriptions in the two option documents. One easement document described realty which in one area was approximately 40 feet wider than the option description. The easement documents contained realty descriptions containing only 2.6 acres and the option agreements described an area of 3.5 acres. Before March 31, 1973, defendant refused to execute the two easement documents, Plaintiff's Exhibits 8 and 9. The option agreements provided, inter alia:

> "* * * all of the provisions contained in this option shall, * * * be incorporated into a final instrument of conveyance, * * * provided grantee pays or tenders to grantor * * * in full satisfaction of rights obtained, the sum of * * *. * * * and such tender, payment or deposit shall constitute a full compliance of grantee's obligations hereunder, and grantor shall forthwith execute and deliver a final instrument of conveyance * * * to grantee * * *."

Defendant never fulfilled the responsibility imposed upon him by such provision to prepare, execute or deliver to plaintiff easement documents containing the same description as contained in the option agreements. Thereafter, after commencement of this legal acton, plaintiff prepared and tendered to defendant and filed in the record in this action on April 15, 1974, two easement documents for defendant's signature containing the exact real estate description as contained in the two option agreements, Plaintiff's Exhibits 1 and 2, but defendant has failed and

refused to execute such agreements. The option agreements were binding upon defendant, the terms and real estate description therein definite and certain, and plaintiffs had exercised its rights to purchase under the options and had fully performed its obligations under such options and plaintiff at no time abandoned its rights under such option agreements. The variance in the realty description of the two easement documents identified as Plaintiff's Exhibits 8 and 9 and the two option agreements, Exhibits 1 and 2, is not a sufficient basis for defendant to refuse to execute and deliver to plaintiff such easement documents, and plaintiff is entitled to a decree of specific performance to compel defendant to execute the two easement documents filed April 15, 1974, in the record in this case or the easement documents identified as Plaintiff's Exhibits 8 and 9. *Gilbert* v. *Port,* 28 Ohio St. 276; 49 O.Jur. 2d 566-570, Secs. 54. 55. By reason of the foregoing determination, assignments of error Nos. 2, 3 and 4 are well taken. For the reasons hereinabove stated defendant-appellee's two assignments of error are not well taken.

The record reveals that the trial court found that the opposition to plaintiff's motion to compel discovery was substantially justified and to make an award of expenses would be unjust, and such determination was no abuse of discretion by the trial court in its refusal to impose sanctions upon defendant pursuant to Civ. R. 37 pertaining to the refusal of defendant Holly to answer questions upon the taking of his deposition. Accordingly, assignment of error No. 1 is not well taken. *State Automobile Mutual Ins. Co.* v. *Chrysler,* 36 Ohio St. 2d. 151.

Judgment of the Common Pleas Court of Ottawa County is reversed at costs of defendant-appellee, and coming now to enter the judgment which the trial court should have rendered, it is ordered, adjudged and decreed that defendant specifically perform the provisions of the two option agreements by executing the two easement documents on file in the record in this case containing the same legal description as the option agreements, or, in the alternative, that defendant execute the two easement documents identified as Plaintiff's Exhibits 8 and 9, if the defendant prefers such alternatives, and that the $3,500.00 on deposit at the American Bank in the name of defendant is hereby decreed to be the sole property of defendant in payment of the above described easements. Judgment of the Common Pleas Court denying imposition of sanctions upon defendant under Civ. R. 37 is affirmed. Cause remanded to said court for execution of this judgment and for costs.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be file-stamped by the Clerk of the Court of Appeals, at which time the period for review will begin to run. App. R. 22 (E) .

/s/ JOHN W. POTTER
Presiding Judge

/s/ CLIFFORD F. BROWN
Judge

/s/ FRANK W. WILEY
Judge

EXHIBIT H

KNOW ALL MEN BY THESE PRESENTS

That I, JOHN HOLLY, JR., aka JOHN HOLLY, an unmarried person, claiming title by virtue of instruments recorded in Volume 206, Page 353; Volume 203, Page 503; Volume 203, Page 505; Volume 119, Page 548; Volume 115, Page 262; Volume 166, Page 107; Volume 122, Page 666; and Volume 106, Page 349 of the Ottawa County Deed Record, the Grantor, for and in consideration of the sum of Three Thousand Five Hundred Dollars ($3,500.00) and other valuable considerations received to my full satisfaction of OHIO EDISON COMPANY, an Ohio corporation, the Grantee, do hereby grant unto Grantee, its successors and assigns, an easement and right-of-way, with the rights and privileges hereinafter set forth, for lines for the transmission and distribution of electric current, including telephone and telegraph, upon, over, under and across the following described premises:

Situated in the Township of Portage, County of Ottawa, State of Ohio, being a part of Section 5, Township 6 North, Range 17 East.

PARCEL No. 1:

An irregular-shaped parcel of land bounded on the east by the Grantor's easterly property line, bounded on the southeast by the northwesterly limits of an easement granted Ohio Edison Company by John Holly, Sr. on March 25, 1955 and recorded in Volume 178, Page 230 of the Ottawa County Deed Records, bounded on the south by Grantor's southerly property line, and bounded on the northwest by the northwesterly line of right of way, which northwesterly line of right of way is described as follows:

The northwesterly line of said right of way enters Grantor's premises from the land of H. Dye at a point

on said Grantor's easterly property line approximately 493 feet northerly from Grantor's southeast corner; thence from this point in a general southwesterly direction across Grantor's premises approximately 496 feet to a point on Grantor's southerly property line approximately 41 feet westerly from Grantor's aforesaid southeast corner where said line crosses to the lands of J. Holy, Jr.

PARCEL No. 2:

Crossing No. 1

A strip of land abutting and parallel to an existing easement granted Ohio Edison Company by John Holly, Jr. on March 25, 1955 and recorded in Volume 178, Page 234 of the Ottawa County Deed Records, said strip of land being 35 feet wide, 25 feet on the northwesterly side and to the northwesterly limits of said existing easement on the southeasterly side of a survey line, which survey line of right of way is described as follows:

The survey line of said right of way enters Grantor's premises from the land of J. Holly, Jr. at a point on said Grantor's upper northerly property line approximately 576 feet easterly from Grantor's upper northwest corner; thence from this point in a general southwesterly direction across Grantor's premises approximately 542 feet to a point on the northwesterly limits of State Route 2 right of way; thence continuing in said southwesterly direction across said State Route 2 right of way approximately 492 feet to a point on the southeasterly limits of said State Route 2 where said survey line re-enters Grantor's premises; thence continuing in said southwesterly direction across Grantor's

premises approximately 648 feet to a point on Grantor's upper southerly property line, said line being the southerly line of Section 5, approximately 860 feet westerly from Grantor's upper southeast corner, said corner being the southeasterly corner of Section 5,

where said line crosses to the lands of B. E. and B. A. Heileman.

Crossing No. 2

A strip of land abutting and parallel to and existing easement granted Ohio Edison Company by an instrument recorded in Volume 3, Page 631 of the Ottawa County Records, said strip of land being approximately 35 feet wide, 25 feet on the northwesterly side and to the northwesterly limits of said existing easement on the southeasterly side of a survey line, which survey line of right of way is described as follows:

The survey line of said right of way re-enters Grantor's premises from the land of B. E. and B. A. Heileman at a point on said Grantor's lower easterly property line approximately 1,627 feet northerly from Grantor's lower southeast corner, said corner being in the center of Lockwood Road; thence from this point in a general southwesterly direction across Grantor's premises approximately 58 feet to an angle point where said survey line angles to the right approximately 7 degrees; thence from this point in a general southwesterly direction approximately 1,183 feet to an angle point where said survey line angles to the right approximately 21 degrees; thence from this point in a general westerly direction as a strip of land being 25 feet on the northerly side and to the northwesterly limits of Grantee's aforesaid existing easement on the southerly side of said survey line approximately 169 feet to a point on Grantor's lower westerly property line approximately 1,178 feet northerly from Grantor's southwest corner, said corner being in the center of Lockwood Road, where said line crosses to the lands of H. and B. Johannsen. Together with the right to install guy wires and anchors within or adjacent to the right of way herein granted wherever necessary.

The easement and rights herein granted shall include the right to erect, inspect, operate, replace, relocate, repair, patrol and permanently maintain upon, over, under and

along the above described right of way across said premises all necessary structures, wires, cables and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, including telephone and telegraph, and the right of reasonable ingress and egress upon, over and across said premises for access to and from said right of way, and the right to trim, cut, remove or control by any other means at any and all times such trees, limbs, and underbrush within or adjacent to said right of way as may interfere with or endanger said structure, wires or appurtenances, or their operation.

The Grantor reserve the right to use the ground between said structures and beneath the said wires, provided that such use does not interfere with or obstruct the rights herein granted, and the Grantor agree that no building, obstruction or impediment of any kind shall be placed within said right of way or between said structures or beneath said wires without prior written approval of the Grantee.

The Grantee will repair or replace all fences, gates, lanes, driveways, drains and ditches damaged or destroyed by it on said premises or pay Grantor for all damage to fences, gates, lanes, driveways, drains, ditches, crops and stock on said premises caused by the construction or maintenance of said lines.

TO HAVE AND TO HOLD the said easement, rights and right of way and its appurtenances to said Grantee and to its successors and assigns forever; and the Grantor represents that they are the lawful owners of said premises and have full power to convey the rights and easements herein granted, that the same are free and clear of all encumbrances and that they will warrant and defend the same against all lawful claims and demands whatsoever, except current taxes and assessments not yet due and pay-

able, easements, restrictions and reservations of record, and zoning ordinances, if any, and for valuable consideration the Grantor does each hereby remise, release and forever quit-claim unto Grantee, its successors and assigns, all their right and expectancy of dower in the above described right of way.

IN WITNESS WHEREOF, I have hereunto set my hand as of the ..... day of ....., 197...

Signed in the presence of:

.....

.....

.....

John Holly, Jr.

STATE OF OHIO
COUNTY OF OTTAWA ss:

Before me, a Notary Public, in and for said County and State, personally appeared JOHN HOLLY, JR., aka JOHN HOLLY, an unmarried person who acknowledged that he did sign the aforegoing instrument and that the same is his free act and deed.

IN TESTIMONY WHEREOF I have hereunto set my hand and official seal at Port Clinton, Ohio this ..... day of ....., 1974.

.....

Notary Public

This instrument prepared by Paul C. Moon, Attorney, and pursuant to an Order of the Court of Common Pleas of Ottawa County, Ohio, Case No. 18085, dated the ..... day of ....., 1974.

EXHIBIT I

KNOW ALL MEN BY THESE PRESENTS

That I, JOHN HOLLY, JR., aka JOHN HOLLY, an unmarried person, claiming title by virtue of instruments recorded in Volume 206, Page 353; Volume 203, Page 503; Volume 203, Page 505; Volume 119, Page 548; Volume 115, Page 262; Volume 166, Page 107; Volume 122, Page 66; and Volume 106, Page 349 of the Ottawa County Deed Record, the Grantor, for and in consideration of the sum of Three Thousand Five Hundred Dollars ($3,500.00) and other valuable considerations received to my full satisfaction of OHIO EDISON COMPANY, an Ohio corporation, the Grantee, do hereby grant unto Grantee, its successors and assigns, an easement and right-of-way, with the rights and privileges hereinafter set forth, for lines for the transmission and distribution of electric current, including telephone and telegraph, upon, over, under and across the following described premises:

Situated in the Township of Portage, County of Ottawa, State of Ohio, being a part of Sections 5 and 8, Township 6 North, Range 17 East.

PARCEL No. 1:

An irregular-shaped parcel of land bounded on the east by Grantors' easterly property line, bounded on the southeast by the northwesterly limits of an easement granted Ohio Edison Company by John Holly, Sr. on March 25, 1955 and recorded in Volume 178, Page 230 of the Ottawa County Deed Records, bounded on the south by Grantors' southerly property line, and bounded on the northwest by the northwesterly line of right of way, which northwesterly line of right of way is described as follows:

The northwesterly line of said right of way enters Grantors' premises from the land of Howard Dye at a

point on said Grantors' easterly property line approximately 29 rods northerly from Grantors' southeast corner; thence from this point in a general southwesterly direction across Grantors' premises approximately 30 rods to a point on Grantors' southerly property line approximately 4 rods westerly from Grantors' southeast corner where said line crosses to the lands of John Holly, Jr.

PARCEL No. 2:

Crossing No. 1

A strip of land abutting and parallel to an existing easement granted Ohio Edison Company by John Holly, Jr., on March 25, 1955 and recorded in Volume 178, Page 234 of the Ottawa County Deed Record, said strip of land being 35 feet wide, 25 feet on the northwesterly side and to the northwesterly limits of said existing easement on the southeasterly side of a survey line, which survey line of right of way is described as follows:

The survey line of said right of way enters Grantors' premises from the land of John Holly, Jr., et al, at a point on said Grantor's upper northerly property line approximately 34 rods easterly from Grantor's upper northwest corner; thence from this point in a general southwesterly direction across Grantor's premises approximately 33 rods to a point on the northwesterly limits of State Route 2 right of way; thence continuing in said southwesterly direction across State Route 2 right of way approximately 29 rods to a point on the southeasterly limits of State Route 2 where said survey line re-enters Grantor's premises; thence continuing in said southwesterly direction across Grantor's premises approximately 39 rods to a point on Grantor's upper southerly property line, said line being the southerly line of Section 5, approximately 51 rods westerly from Grantor's upper southeast corner, said corner being the southeasterly corner of Section 5, where said line crosses to the lands of B. E. and B. A. Heileman.

Crossing No. 2

A strip of land 50 feet wide, 25 feet on each side of a center line, which center line of right of way is described as follows:

The center line of said right of way enters Grantor's premises from the land of B. E. and B. A. Heileman at a point on said Grantor's lower easterly property line approximately 101 rods northerly from Grantor's lower southeast corner, said corner being in the center of Lockwood Road; thence from this point in a general southwesterly direction across Grantor's premises approximately 81 rods to an angle point where said survey line angles to the right approximately 23 degrees; thence from this point in a general westerly direction approximately 5 rods to a point on Grantor's lower westerly property line approximately 72 rods northerly from Grantor's southwest corner, said corner being in the center of Lockwood Road, where said line crosses to the lands of H. and B. Johannsen.

Together with the right to install guy wires and anchors within or adjacent to the right of way herein granted wherever necessary.

The exact locations of said rights of way is to be designated by Plaintiff after its final surveys are made and in any event before the construction of said lines shall be commenced.

The easement and rights herein granted shall include the right to erect, inspect, operate, replace, relocate, repair, patrol and permanently maintain upon, over, under and along the above described right of way across said premises all necessary structures, wires, cables and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, including telephone and telegraph, and the right of reasonable ingress and egress upon, over and across said premises for access to and from said right of way, and the right to trim, cut,

remove or control by any other means at any and all times such trees, limbs, and underbrush within or adjacent to said right of way as may interfere with or endanger said structure, wires or appurtenances, or their operation.

The Grantor reserve the right to used the ground between said structures and beneath the said wires, provided that such use does not interfere with or obstruct the rights herein granted, and the Grantor agree that no building, obstruction or impediment of any kind shall be placed within said right of way or between said structures or beneath said wires without prior written approval of the Grantee. The Grantee will repair or replace all fences, gates, lanes, driveways, drains and ditches damaged or destroyed by it on said premises or pay Grantor for all damage to fences, gates, lanes, driveways, drains, ditches, crops and stock on said premises caused by the construction or maintenance of said lines.

TO HAVE AND TO HOLD the said easement, rights and right of way and its appurtenances to said Grantee and to its successors and assigns forever; and the Grantor represents that they are the lawful owners of said premises and have full power to convey the rights and easements herein granted, that the same are free and clear of all encumbrances and that they will warrant and defend the same against all lawful claims and demands whatsoever, except current taxes and assessments not yet due and payable, easements, restrictions and reservations of record, and zoning ordinances, if any, and for valuable consideration the Grantor does each hereby remise, release and forever quitclaim unto Grantee, its successors and assigns, all their right and expectancy of dower in the above described right of way.

IN WITNESS WHEREOF, I have hereunto set my hand as of the ..... day of ....., 1974.

Signed in the presence of:

IN WITNESS WHEREOF, I have hereunto set my hand as of the ..... day of ..... 1974.

Signed in the presence of:

.....

.....

.....

John Holly, Jr.

STATE OF OHIO
COUNTY OF OTTAWA ss:

Before me, a Notary Public, in and for said County and State, personally appeared JOHN HOLLY, JR., an unmarried person, aka JOHN HOLLY, who acknowledged that he did sign the foregoing instrument and that the same is his free act and deed.

IN TESTIMONY WHEREOF I have hereunto set my hand and official seal at Port Clinton, Ohio this ..... day of ....., 1974.

.....

Notary Public

This instrument prepared by
Paul C. Moon, Attorney, and
pursuant to an Order of the
Court of Common Pleas of Ottawa
County, Ohio, Case No. 18085,
dated the ..... day of ....., 1974.

EXHIBIT J

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Testimony of Defendant Holly

[17] Q. Mr. Holly, do you recognize Mr. Campbell seated here (indicating)?

A. Yeah.

Q. Mr. D. R. Campbell. Do you know him to be an employee of the Ohio Edison Company?

A. I didn't know until he come down my place.

Q. Okay. But he introduced himself as an employee of the Ohio Edison Company?

A. Yes.

Q. When did he first come to your place, do you [18] recall?

A. About a year ago, I think.

Q. Approximately a year ago. Do you know whether it was in —

A. Something like that. I don't know.

Q. Do you know whether it was in 1972 or 1971?

A. '71.

Q. I didn't understand.

A. I think it was '71.

Q. '71?

A. Uh-huh.

Q. What time of the year was it, do you recall that?

A. I don't know. In March, somewhere in there I think.

Q. When did you first talk to him, Mr. Campbell?

A. That's the first time.

Q. Okay. Did he come to your home?

A. Yeah.

Q. What did he tell you when he first talked to you?

A. Well, he — we got to know one another, shake hands; and then he says who he is and what's he there for, and so, we sat down and we got to talking.

[19] Q. What did he say he was there for?

A. He was there after this here — he explained that they are going to get another line through there and they need the land, and then he presented option papers and the option. He didn't know whether he needed the land or not, and that's the conversation we had.

Q. Did he show you the option papers at your first meeting?

A. We got —

Q. The first time you talked to him?

A. Yeah.

MR. MOON: Would you please mark these as Plaintiff's Exhibit 1 and 2?

(Handing)

(Thereupon Reporter marked Plaintiff's Exhibits 1 and 2 for identification.)

BY MR. MOON:

Q. Mr. Holly, I'm going to show you what has been marked for identification as Plaintiff's Exhibits Number 1 and 2 and ask you if you can identify those two papers (handing)?

A. Yeah.

[20] Q. Have you ever seen them before?

A. (Indicating).

Q. When did you first see those papers?

A. When — he wrote what was to be filled in here and he said there would be an option set up and so much put down, and $20.00 each one of them.

Q. Are these the options that Mr. Campbell gave to you at the first meeting?

A. It resembled something like this here paper presented to me (indicating).

Q. If you'll look on the reverse side of each paper, is that your signature?

A. Yeah.

Q. Do you recognize that to be your signature?

A. Yeah.

Q. And is that the signature of Mr. Campbell opposite yours?

A. Yeah.

Q. And what is the date of each option?

A. April 9th.

Q. Of what year?

A. 4th day of April, 1972.

Q. Were these actually signed by you at the first [21] meeting between you and Mr. Campbell?

A. Yeah.

Q. Or were there one or two meetings?

A. And then he was undecided whether that one strip of land was mine or not, so he went and checked on that first, see, and then afterwards, that's where he went through.

Q. Who did he check with on that one strip of land?

A. I don't know where he went to check. At the court house, I guess.

Q. Did you at that time tell him to check with Attorney Douglas Myer?

A. No — oh, yeah, I told him. Yeah, Attorney Myer made the transaction for me then because of he was my brother's lawyer, see. Mr. Corogin was mine and —

Q. But you sent him —

A. So I told him go up there and see Mr. Myer because he went through all this transaction, you know, my dad's property, see.

Q. Your father's estate?

A. Yeah, my father's estate.

Q. Were you paid $20.00 for executing each option?

[22] A. Yes.

Q. On that particular date?

A. Yes.

Q. Were you told at that time what you would receive when the easements were finally given?

A. That's right.

Q. What were you told as far as purchase price is concerned?

A. Well, it was a thousand dollars an acre; and then, that's the way it was put, and he got that little strip on the — my dad's place, I guess that was called, a half an acre or something like that.

Q. So, what was the total purchase price for the two easements to be?

A. $3500.00.

Q. All right. Now, was that Edison's price or was that your price?

A. I told him my price, see.

Q. Okay. What did he first suggest to you as a purchase price?

A. Well, he thought it was kind of high, I guess, but then he agreed to that price.

Q. So, he agreed with you as to the price?

[23] A. Uh-huh.

Q. Okay. And that was a total of $3,500.00?

A. Uh-huh.

Q. And you were satified with that price?

A. Well, I didn't go dealing through directly because the way he put it, he says, "Now, I don't know whether we need that land." So I says, "Well, this is just to hold it, see, this option, to hold it; and furthermore. I was — we'll proceed when they really need it."

He said, "This option is not sold at the time."

Q. So, you knew at the time in April of 1972 that it might be possible for Ohio Edison to sell that option to somebody?

A. Well, I don't know what they would have done, but you know, sometimes there's people come in there tricky and they trick you into things, but I didn't think he was a tricky guy, but he went along sensible, you know.

Q. You never had any difficulties with him or arguments?

A. No.

Q. He agreed to the price?

[24] A. I had an argument with one guy the first time that line went through. He give me a rough time. At that time I didn't know Mr. Corogin. I guess that was another attorney I went to. I don't remember now his name.

Well, he flunked in his job. I guess he done some dirty work and he lost his lawyer's profession and everything.

Maybe you could come up with someone.

Q. I don't know who you're talking about.

A. And then I had trouble with them. I had to sue him for my income tax money, you know, and I gave him that income tax and he said, "John, I'll save you money. Let me pay for your" — maybe this shouldn't be brought up — "Yet me pay your income tax. I'm going to Toledo." and my income tax was $420.00, and I heard through the news that he had done dirty work there and there and there. I wondered if I'm sitting in the same boat. Sure enough, I had — Mrs. Slaughter was the lawyer I went to, Mrs. Slaughter then, and I says, "Will you check into this, if my income tax is paid?" So, she called up, on records of it. Well, I was in the same boat. He put my money on his own, [25] you know.

Q. So, at the time of the first Ohio Edison —

A. And the first guy gave me trouble.

Q. You had trouble not only with the agent but also with the lawyer as a result of it at the same time?

A. Yeah, I had trouble all the way down the line, you know, like that.

Q. So, this time you were on the alert?

A. I was on the alert and still I couldn't win. I couldn't win anything with that guy, a different company represented him, you know.

Q. You're talking about the first man?

A. No, this other one that tricked the whole job.

Q. You're not talking about Mr. Campbell now?

A. No, not Mr. Campbell; the other fellow. He's a tall and skinny fellow, and boy, he was a tough guy. I mean, he must have talked to that lawyer and that lawyer says, "Well, John, I think you have to go along with this because there's no other choice." and so I went along.

Q. Yes. See, like I followed the lawyer's orders, you know, thinking he knows what he's doing. He said, [26] "You can't win anyway," he says; and then that other guy called me, he says, "Well, we can't put hooks on in the moon, run hook wires up that way, you know." He was kind of dirty, this other guy.

Q. Well, now, getting back to Mr. Campbell, did you ask him to show you any information or any prints or drawings of the easements at your first meeting when you signed the option?

A. Well, he did have some kind of a map or —

Q. Is that an aerial photograph?

A. Yeah, something like that. He had something.

MR. MOON: Could you mark that as Plaintiff's 3? (handing)

(Thereupon Reporter marked Plaintiff's Exhibit 3 for identification.)

BY MR. MOON:

Q. Now, Mr. Holly, I'm going to show you what's been marked as Plaintiff's Exhibit Number 3 and ask you if you can recognize that document? (handing)

A. Well, whether this is it or it was another one, but I don't know. It was something like this.

Q. Does that look like the aerial map that he showed you in April of '72?

[27] A. Yeah. I really don't recall whether it's something like this or — but he showed me something like this. He showed me the — where the pole has to go and all that, you know.

Q. Now, in April of '72 did you ask any questions of Mr. Campbell that he refused to answer for you?

A. Well, I didn't go through too much conversation with him.

Q. Were you ever told by Mr. Campbell that you couldn't have a lawyer?

A. No, he never told me that.

Q. At this time in April of '72 did you ever ask to see a lawyer?

A. No, I didn't.

Q. Did you ever ask Mr. Campbell to go to a lawyer's office with you?

A. No, he never — I never did and he never asked me either, so we didn't.

Q. Now, after this meeting in April of '72 when you signed the options, did you ever see Mr. Campbell again after that?

A. I think I saw him at the time he checked that there dad's property, you know. I think he came down [28] there and told me that that property was in my name.

Q. In your name?

A. Yeah.

Q. Did you have any difficulties with him on this second meeting?

A. No.

Q. You didn't have any argument with him or anything like that?

A. No.

Q. Did you talk about anything else other than the title defect on your father's property at that time?

A. No.

Q. Now, who was the next person you saw from Ohio Edison Company involving these easements?

A. I didn't see nobody.

Q. Do you recognize Mr. Maschmeier here (indicating)?

A. I recognize him. I thought I saw him somewhere. I don't know.

Q. Did he ever come out to talk to you about the easements?

A. I really don't remember.

Q. Did he come out and give you the actual easement instruments to sign some time after April of 1972?

[29] A. I don't know. There are the only ones that we have.

One time I signed. That's all.

Q. Yes. Do you recall Mr. Maschmeier giving you any additional papers to sign?

A. (Indicating).

Q. Do you remember going to Southwood Insurance Agency office with Mr. Maschmeier?

A. Oh, I remember that, yes. He wanted — I guess he said that we ought to go to Notary Public.

Q. To sign the easements?

A. To sign the easements, because we couldn't find him. The person wasn't there.

Q. Did he have the $3500.00 for you at that time?

A. I don't know whether he did or not.

Q. Did he suggest that you go to Mrs. Southwood's office or did you suggest that?

A. He suggested we ought to go.

Q. Were you willing to go to her office?

A. Well, we went there, yes, to get this done properly.

Q. He didn't force you to go to her office?

A. No, he said we got to get this through. I guess [30] he had the money to pay for the thing and we had to go through a Notary Public, you know, and all that, but –

Q. So, you were willing to go there to Mrs. Southwood's office?

A. Yeah.

Q. He didn't threaten you or anything of that sort?

A. No, no threats.

Q. Did Mr. Campbell ever threaten you?

A. No.

Q. Or tell you if you didn't sign any papers he'd have to take you to court?

A. No, there was no threatening or anything like that.

Q. All right. Now, what happened at Mrs. Southwood's office?

A. The party wasn't there, so I don't know how this was done now after. We left that office. We just didn't do it, I guess.

Q. Did you take Mr. Maschmeier here to Mr. Corogin's office when Mrs. Southwood wasn't in?

A. I don't remember.

Q. Did you tell Mr. Maschmeier that you knew of [31] another place where you could find a Notary Public?

A. Yeah.

Q. And was that Mr. Corogin's office?

A. Mr. Corogin's office.

Q. What happened when you got to Mr. Corogin's office?

A. I don't know whether he wasn't in or what happened then. I don't know.

Q. Do you remember talking to Mr. Corogin at that time?

A. No, we never got in contact with him.

Q. You never got to talk to him?

A. Afterwards, after a while, when this come up, I guess I seen Mr. Corogin.

Q. But I mean, on this same day that you hadn't been able to see Mrs. Southwood.

A. We haven't seen Mrs. Southwood. It was noon and I guess she was at dinnertime.

Q. Do you remember talking to Mr. Corogin on that same day?

A. Yes.

Q. Do you?

A. Yes.

[32] Q. And that's when you took Mr. Maschmeier up there?

A. Yeah, that's where we went.

Q. Did you ask Mr. Corogin's secretary to notarize these easements?

A. (Indicating).

Q. Do you know whether Mr. Maschmeier asked his secretary to notarize the easements?

A. I don't remember. It's so far back I can't remember that.

Q. What's the reason you took Mr. Maschmeier up to Mr. Corogin's office?

A. Well, because we couldn't get it done at what you call it, at –

Q. Southwood's?

A. Southwood's.

Q. You couldn't get the Notary at Southwood's?

A. She was at home at dinnertime, I guess, and – just one of those –

Q. So, you took Mr. Mascheier up to Mr. Corogin's office to have the easements –

A. I think we went somewhere else, but it was him.

Q. – easement notarized?

[33] A. Yeah, I don't know for sure now where we went because we had a hard time. It was noon and he was recommending here and there, and I guess – I don't know. We had to go somewhere and I don't know how he done that even.

Q. So, at that point you were willing to have the easements signed?

A. Well, yeah. We went through, you know, but then, what was in my mind at that moment, see, when the easement was to be signed, there was something else come up. There was damages because it was just an option on the place, see.

Q. Well, when you signed the option in April of 1972, did you read the option over?

A. Well, I signed the papers because Mr. Campbell, I guess, mentioned it would be $20.00 for each one of these, but he didn't right away have me sign it because he didn't know I owned that piece of land of my dad's.

Q. So, he didn't insist that you sign them right away?

A. No.

Q. Did he leave them with you for a period of time?

A. No, nothing was left there.

[34] Q. He didn't leave the papers with you to read over?

A. Nothing was left there.

Q. Did you in fact read those option papers over before you signed them?

A. I read them.

Q. You did. And you didn't read anything in there that caused you any problems as far as your property was concerned?

A. No. No, except for damages. There were supposed to be damages involved, you know, after the whole thing went through properly, you know, that they wanted, because what I lived up with was him saying I didn't know whether I needed it, see.

Q. Now, were you expecting that Ohio Edison Company would pay you damages in addition to the $3500.00.

A. Yeah.

Q. Where did you learn that?

A. I had it in my mind all the time, but nothing was said at the time him and I was together, see.

Q. Did you ever ask Mr. Campbell about that?

A. I never, because an option is just an option [35] and you're not buying it at the moment.

Q. Yes, but you knew Ohio Edison had the right to buy it at a later time?

A. That's all we had in mind, see.

Q. That they could buy it at a later time for $3500.00?

A. At a future date.

Q. For $3500.00.

A. (Indicating).

Q. Are you answering yes?

A. Yeah.

Q. Okay. After you left Mr. Corogin's office with Mr. Maschmeier where did you go then?

A. I don't know where we went.

Q. Did Mr. Maschmeier take you home?

A. I guess I went in his car and he brought me back home again.

Q. Did you make any statements to Maschmeier in the car on the way home?

A. No, nothing was discussed.

Q. Did you tell him that you were sorry Mrs. Southwood wasn't in?

A. No, I didn't say I was sorry. I didn't say nothing.

[36] Q. Did you tell Mr. Maschmeier that it's too bad Mrs. Southwood wasn't in, but you didn't want to make your lawyer mad?

A. No, I didn't say nothing like that, no. I had no idea.

Q. Did you have any conversation at all with Mr. Maschmeier on the way home?

A. No.

Q. Didn't say anything?

A. Nothing at all.

Q. You sat there quiet the whole way home?

A. Just sat there and, fine weather, and you know, like you usually talk.

Q. But you didn't discuss what happened in Mr. Corogin's office at all?

A. I don't discuss nothing. Nothing is discussed.

Q. When you were in Mr. Coroigin's office, did you talk to Mr. Corogin at any time that Mr. Maschmeier was not present?

A. I don't know about that. I don't remember so far back. This all is a year ago or better. I didn't think that it was serious, you know.

[37] Q. Do you recall when you went to Mr. Corogin's office, what time of the year?

A. I don't remember.

Q. Was it in 1972 or 1973?

MR. MASCHMEIER: I can find out. I have a file.

BY MR. MOON:

Q. You don't recall?

A. (Indicating).

Q. But it was after you talked to Mr. Campbell? I mean, your first contract was with Mr. Campbell?

A. Mr. Campbell was the whole story from the beginning.

Q. And then some time later Mr. Maschmeier came along to have the easements signed?

A. He come in there. I don't know.

Q. So, you talked to Mr. Maschmeier and went to Mr. Corogin's office after your first conversations with Mr. Campbell?

A. This whole thing is out of my mind, really. I can't go back.

Q. Well, was it recently that you were in Mr. Corogin's office?

[38] A. Recently?

Q. Yes, like within the last few months.

A. Yes.

Q. Since May or June of 1973?

A. Somewhere in there, yeah.

Q. Somewhere in there. Okay.

MR. MOON: Mark those as 4 and 5, Plaintiff's.

(Thereupon Reporter marked Plaintiff's Exhibits 4 and 5 for identification.)

BY MR. MOON:

Q. I'm going to show you, Mr. Holly, what's marked for identification as Plaintiff's Exhibits 4 and 5 and ask you if you can identify these two documents? (handing)

MR. COROGIN: If you know what they are, John.

MR. MOON: That's all we're asking, if you can identify them, if you've ever seen them before.

MR. COROGIN: Look on the back and see if you signed them.

[39] BY MR. MOON:

Q. Now, I'm not asking you if you signed them, because obviously, they're not signed.

All I'm asking you is if you've ever seen them before.

A. I don't know whether I seen these before. I don't remember.

Q. So, you do not recognize Plaintiff's Exhibits 4 and 5?

A. No.

Q. Do you recall ever seeing them before?

A. No.

Q. Now, Mr. Holly, you're aware that a lawsuit has been filed in the Common Pleas Court and that that's the reason we're here today?

A. (Indicating).

Q. And you know that you filed an Answer in the lawsuit.

A. (Indicating).

Q. Now, in your Answer you deny that you ever entered into an agreement with Ohio Edison Company.

Could you explain that to us, please?

A. Just on the option. That's the only thing.

[40] Q. So, you agree that you did enter into the option?

A. Oh, the option. That's as far as I went. No further.

Q. There's no question in your mind about agreeing with Ohio Edison as to the option?

A. Just option, yeah.

Q. Yes, okay.

A. I lived up to the words that was told me, they didn't think they needed it or not.

Q. So, what do you mean in your answer when you said that you denied ever entering into an agreement with them?

A. Well, that's the only agreement I had with them.

Q. So, you did actually enter into an agreement with them?

A. With the option, yes.

Q. Now, further in your answer you stated that there was never a meeting of minds between you and Ohio Edison Company.

What do you mean by that statement?

A. Well, what is meant about that is I didn't deal with them, just only the option.

[41] Q. Just for the option?

A. Yeah, that's the only thing.

Q. You also state in your answer that you did sign some papers, and that, I assume, was the option agreement, the two option agreements?

A. Yeah.

Q. You state in your answer that you were never shown specifications, illustrations, grade changes or other plans.

I'm asking you, Mr. Holly, did you ever ask Mr. Campbell or Mr. Maschmeier to show you specifications, illustrations, grade changes or other plans?

A. I never did ask them because I didn't — all he went is through the option. Now, that's all. And I didn't ask him any further.

Q. These two options, you stated previously you read them before you signed them?

A. Yeah.

Q. How long did you have them in your possession before you signed them, do you recall that?

A. I don't remember.

Q. Was it a period of minutes?

A. Yeah, just –

[42] Q. Half a day?

A. He filled them out and then I guess they were signed and –

Q. You had them long enough to read them over at least?

A. I read them, yeah.

Q. Who was present when you signed two option agreements?

A. Nobody.

Q. Was Mr. Campbell there?

A. Mr. Campbell, I guess.

Q. Nobody else was there. He didn't force you to sign them?

A. No. No.

Q. Or he didn't threaten you?

A. No.

Q. Threaten to take you to court?

A. No.

Q. And you stated earlier that you were paid $20.00 for each option?

A. Yeah.

Q. Did he give you the money at that time?

A. I don't remember whether it was at that time or [43] he brought it later. Now, I don't know.

Q. You've stated in your answer that the Plaintiff refused you the right to legal counsel. When did that happen?

A. Well, I told him I was going to postpone this whole thing, see. That's the way I went with it.

Q. Who did you tell you were to postpone it?

A. The guy that was there, Mr. Campbell or somebody. I don't know. I don't remember.

Q. Could it have been Mr. Maschmeier?

A. I don't know which one. I told him to postpone the whole idea for a while until I made up my mind; and he said, "This is just an option," he said. So, that's the way it was, just an option.

Q. Now, did you tell Mr. Campbell that you wanted the matter postponed before or after you signed the option?

A. No, before we – before I signed it.

Q. Are you sure it was before you signed the option?

A. Yeah.

Q. Did you perhaps tell Mr. Machmeier that you wanted the matter postponed before you signed the [44] easements?

A. Now, I don't know about that because this thing was going so far back. I think I talked to them both like that, postpone the whole idea until I made up my mind.

Q. In what regard did either Mr. Maschmeier or Mr. Campbell refuse you the right to legal counsel?

A. He didn't refuse me, but I wanted to postpone it, you know, so I could get some advice from somebody how to go about this and all that, but that's all –

Q. Did you tell him that at the time?

A. Yeah, I think I did.

Q. That you wanted advice from somebody?

A. I wanted to get some information from somebody how to go about this.

Q. But still, you voluntarily signed the option?

A. I signed it because he told me. He said, "This is nothing but an option.", see.

Q. Did Mr. Maschmeier or Mr. Campbell or any other person with Ohio Edison ever tell you that you either had to sign the easement or you'd be taken to Court and forced to give an easement?

A. Well, in a way you'd put it that way. He almost [45] had it in his mouth.

Q. Well, did he say anything like that?

A. No, he was saying –

Q. Did he give you any reason to indicate that he was thinking that way?

A. He was thinking, because he was going to go through there anyhow. That was his idea. Even though you don't sign.

Q. Did he tell you they were going to go through there anyway?

A. Because I felt with one I told you about, and he was threatening, that one was threatening. The one that went there the first time. He was nasty; and then to top it all was that we went to see a lawyer at that time and that lawyer was a bad one and he went bad afterwards, you know, and he told me, "Go ahead. Sign on them papers. You don't get no more money."

Q. But we're talking about this case.

A. Okay. Well, then, I had in mind that that's the same thing again, see coming across, that was mine –

Q. But you never signed those options because Mr. Campbell threatened you with legal proceedings?

[46] A. He didn't threaten me, but if he put the pressure on me – because he says, "This is nothing but an option. Just ignore it. We may not need the property to begin with." That was said that way.

And then all the time I had in mind that first guy and it's nothing something else I was going to bump into. That's what I had in mind, and I was a little bit lenient

on the side, but I had asked him. I said, "Let's postpone this till I see somebody give me some idea how to go about this.

Q. Are you aware, Mr. Holly, that $3,500.00 has been deposited to your account at the American Bank by Ohio Edison Company?

A. I don't know.

Q. Did your lawyer ever tell you that?

A. My lawyer told me that they already deposited it in the bank. I didn't know it before.

Q. Did you ever go to the bank to check it?

A. I never did, and then, I thought to myself, I don't even know I got money stuck in the bank.

Q. Also you stated in your answer that you never had an opportunity to discuss the nature, extent and type of the easement or the amount of the money.

[47] Now, did you ever ask Mr. Campbell or Mr. Maschmeier to tell you anything of these things about the easement?

A. (Indicating).

Q. And you stated earlier that the $3500.00 negotiated figure was your suggestion and not theirs, is that right?

A. Yeah.

MR. MOON: Could we take about a two minute break? Is that all right with you, Tom?

MR. COROGIN: Yes.

MR. MOON: I haven't got much more.

(Thereupon, a short recess was taken.)

MR. MOON: Can we go back on the record now?

BY MR. MOON:

Q. Just one or two more questions, Mr. Holly.

You said earlier that you were left with the impression that Ohio Edison would pay you damages in addition to the $3500.00?

[48] A. Yeah.

Q. Now, did that idea come to you from Mr. Campbell?

A. No.

Q. Do you know who it came from?

A. From me.

Q. Did you ask Mr. Campbell about the damages?

A. I never mentioned it because I lived up to just the option and I lived up to those words that were said to me, that they don't know if they'll need it.

Q. All right. Did they say anything to you about damages?

A. No, nothing was said.

Q. Were you ever told that after the installation of the poles and structures that were to go on the easement you would be paid for any crop damages or damage to the real estate that took place during construction?

A. Yeah, but they never do. They do a lot of damage to my property there when they maintain it. They go and mud down — they work in there when it's real muddy and they mud down my street down there, my road, and I guess I had it out with one of these representatives. He come down my house one time and [49] hollered about something; and I says, "Say, buddy," I says, "You're muddying down my road here."; and big lumps of mud, you know, big trucks between the wheels, you know, they'd get mud; and when they'd go down that road, big chunks come off like that and I got to maintain that road myself and they never done it.

Q. But did Mr. Campbell tell you that damages would be paid for destruction that took place to your crops and things during the time of construction?

A. He mentioned something like that. He says, "We'll — when we damage anything, we'll pay for it."

Q. Is that what you had in mind as far as damages were concerned?

A. No, I had in mind I wanted damages before they come in there.

Q. What damages?

A. Because I can't go by that when they're already in there and they damage my crops, you can't get anything off of them.

Q. Well, what damages did you have in mind before they came in there?

A. Well, I can't sell the place over again; and I [50] can't build under it. That's my damages. It's a valuable piece of land.

Q. You didn't consider the $3500.00 damages?

A. Now, that's the price of going through there.

Q. That's the price of the easement?

A. Yeah.

Q. How much additional damage do you want?

A. Oh, I can't sell that property and that's valuable land in there. I'd want $6000.00.

Q. So, if you were to settle this thing with Ohio Edison right now without bothering with the court, you'd want an additional $6,000.00?

A. Right. Then we'll call it quits, when I get $6,000.00.

Q. How did you arrive at that figure?

A. Well, that's the damage. My land is worth, let's see, about $2000.00 a lot, and that's only 40 by 100, and in an acre — how many lots would be in an acre like that?

Q. Have you sub-divided that land?

A. No, I haven't, but some day I might, and then I can't go into that, and that's valuable land.

Q. Do you have any utilities in out there? Is [51] there a sewer?

A. No sewers.
Q. It's not in the City of Port Clinton?
A. No.
Q. You have electrical services?
A. What?
Q. You have electricity out there?
A. Yeah.
Q. Do you have gas?
A. Out through Lockwood Road.
Q. But not there?
A. Not my place, but I guess the way I done it there with that gas company, I can hook onto the line now, you know.
Q. Do you have any streets laid out?
A. No streets.
Q. Concerning the entire morning, Mr. Holly, that you've spent here, do you have anything relating to these options and easements that you want to add? Anything that you've told us this morning that you think needs to be changed or restated?
A. No.
Q. You're answering no?
[52] A. I don't know of anything that I would want to change.
Q. Anything you've told us that you want to clarify?
A. (Indicating).
Q. No? You're shaking your head no? See, you have to say the word so the reporter can put it down. She can't record a head shake.
A. Clarify? What do you mean by that?
Q. Anything you've told us that you think might not be clear in our minds and you want to clarify it for us?
A. Nothing, I guess.

Q. Anything you've told us this morning that you want to take back?
A. No.
Q. Is there anything involved with the options and the easements which are the subject of this lawsuit that you haven't told us that you think we ought to know?
MR. COROGIN: John, here I have to advise you that this is cross examination only, see. He asks you the [53] questions and you can only answer his questions.
We have a lot of things to say in Court.
MR. MOON: I'm going to object to Mr. Corogin's statements.
MR. COROGIN: Well, it's true.
MR. MOON: It's cross examination. I can ask the questions and he can answer or not answer.
MR. COROGIN: So, we have a lot of other things that are a part of our case that aren't being testified to today. So, you better put that in the record.
BY MR. MOON:
Q. Will you tell us some of the other things that we haven't touched upon today that are a part of your case?
MR. COROGIN: John has to consult with me for trial preparation.
MR. MOON: I'm aware of [54] that.
BY MR. MOON:
Q. I'll repeat the question. Are there any other aspects of your case that we haven't touched upon today?
MR. COROGIN: John, you'd have to discuss that with me.
MR. MOON: I'm objecting to Mr. Corogin's statements. It's cross examination and I'm permitted to ask the questions.

MR. COROGIN: That's right, and this is not the complete case. This is only a part of it.

MR. MOON: Mr. Corogin's statements constitute coaching of the witness during a deposition and I object to them.

MR. COROGIN: Advice of counsel. He's entitled to it.

MR. MOON: If you want to take a recess and talk to your client, I have no objection to that; but I do [55] object to being coached during the deposition.

MR. COROGIN: Call it whatever you want.

BY MR. MOON:

Q. Any other aspects of your case that we haven't touched upon today?

MR. COROGIN: There could be more, John. You can't commit yourself.

MR. MOON: Object to Mr. Corogin's statements.

BY MR. MOON:

Q. Can you tell us, Mr. Holly, in what particulars the Ohio Edison Company has treated you improperly or illegally in this whole matter?

A. Well, from the time that line went through, I'll tell you, I was roughed up and I had a deal.

Q. How long ago did the line go through?

A. I don't remember. I don't keep that in mind.

Q. Was it years ago?

A. Oh, yeah.

Q. Long before you ever talked to Mr. Campbell?

A. Oh, yeah, and then, when he come in there, I [56] thought it was another trick. I thought I would fall into something of their will.

Q. Has anything Mr. Campbell ever done to you or

told you upset you or given you cause to believe that Ohio —

A. He was nice. He was all right, but you don't know. This other guy was nice, too, you know, until he went off the track.

MR. MOON: I have no further questions.

I'm going to instruct the Reporter to issue a citation on the refusal to answer the questions.

(Deposition concluded at 11:53 o'clock a.m.)

/s/ JOHN HOLLY, JR.

CERTIFICATE

State of Ohio)
) SS.
County of Lucas)

I, Ellen M. Habeski, a Notary Public within and for the State of Ohio, duly commissioned and qualified, [57] do hereby certify that the within-named witness, JOHN HOLLY, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by him was by me reduced to stenotype in the presence of said witness afterwards transcribed upon a typewriter and that the foregoing transcript is a true and correct transcription of the testimony so given by him as aforesaid.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified and was completed without adjournment.

I do further certify that I am not a relative, counsel, or attorney of either party or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Toledo, Ohio, on this 26th day of September, 1973.

/s/ ELLEN M. HABESKI
Notary Public in and for the
State of Ohio

My commission expires January 19, 1977.

EXHIBIT K

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

Testimony of Larry G. Koehler

[90] DIRECT EXAMINATION BY MR. MOON:

Q. Mr. Koehler, please state your name, age and address?

A. Larry G. Koehler, thirty-seven, 911 Alfred Road, Akron, Ohio.

Q. Akron?

A. Akron.

Q. And your age?

A. Thirty-seven.

Q. And what is your address?

A. 911 Alfred Road, Akron.

Q. And what is your profession?

A. Surveyor.

Q. Are you a registered surveyor with the State of Ohio?

A. Yes.

Q. And what is your registration number?

A. 5103.

Q. And by whom are you employed?

A. Ohio Edison Company.

Q. How long have you been employed by Ohio Edison Company?

A. Eighteen years.

Q. What is your present capacity with Ohio Edison?

A. Ah, minor supervision in charge of surveying.

Q. And what was your capacity in 1972 and 1973?

A. I was . . . I was in a supervision position over survey crews then also.

Q. Could you relate briefly for us the formal education you have [91] had which led to your receiving a certification as registered surveyor from the State of Ohio?

A. I have 18 hours –

MR. COROGIN: We'll stipulate the witness' qualifications, Your Honor.

MR. MOON: All right, that's fine.

Q. Have you had an opportunity to conduct field work, field survey work relating to the John Holly property in Sections 5 and 8 of Portage Township in Ottawa County?

A. Yes, I have.

Q. And when was that field work accomplished?

A. Two weeks ago.

Q. Prior to that time did anyone under your supervision conduct field work relating to this property?

A. Yes, they did.

Q. Who was that person?

A. Don Canavan.

Q. C-a-n-a-v-a-n?

A. Correct.

Q. After Mr. Canavan did field work relating to this property did you have an opportunity to review his work?

A. Yes.

Q. What was your conclusion regarding his field work?

A. Correct.

Q. That it was accurate?

[92] A. It was accurate.

Q. Calling your attention to Plaintiff's Exhibit 3, are you familiar with this document?

A. Yes, I am.

Q. Was it prepared under your supervision?

A. Yes, it was.

Q. After it was prepared and completed did you review it for accuracy?

A. Yes, I did.

Q. Could you tell us in narrative form, tell the Court what this Plaintiff's Exhibit 3 demonstrates?

A. It demonstrates the Holly property as involved with our work, not the entire property, just the parcels involved in our work, and our existing facilities and our proposed facilities across these properties.

Q. It demonstrates the proposed easements which are the subject of this lawsuit, is that correct?

A. Yes, it does.

Q. Now, if you could step down here, there is certain area in Plaintiff's Exhibit 3 which is shaded in green; could you tell the Court what the green area shows?

A. The green area is the existing easement of the Ohio Edison Company across the Holly parcels.

Q. Can you recall either from your own memory or from research that you have done when the green area easements were acquired?

[93] A. This area here was acquired I believe in 1929 . . . I'm not sure of the exact year but around that time.

Q. That's the green shaded area?

A. Green shaded area here.

Q. In the upper lefthand corner of the Exhibit, correct?

A. Correct. And this is in two parcels; picked up the first one in 1955 and I believe the second one is '56.

Q. This is the green area that runs across the botton righthand side of the Exhibit, is that correct?

A. Yes.

Q. That particular area is split; what is this?

A. This is Interstate Highway 2.

Q. State Highway 2?

A. State Highway 2.

Q. That splits the easement. Now, there's a triangular area over adjacent to the immediately previous mentioned area and what is that, shaded in green?

A. Existing easement for that area.

Q. Now, calling your attention further to Plaintiff's Exhibit 3, there are areas shaded in red; what do those areas demonstrate?

A. The proposed easements across these parcels.

Q. This is the proposed easement, the subject of this lawsuit, is that correct?

A. That's correct.

[94] Q. How were you able to plot upon this chart the proposed areas indicated in red?

A. Off the existing easements.

Q. What documents did you work from in order to achieve this plotting on Plaintiff's Exhibit 3?

A. Plan and Profile we made up from the original surveys on these parcels.

Q. By Plan and Profile you mean these two documents which I am tendering as Plaintiff's Exhibits 10 and 11?

A. Yes.

(Plaintiff's Exhibits 10 and 11 marked for the purpose of identification)

Q. Sit back down, Mr. Koehler, it will take some time to review those.

(Witness resumed the stand)

Q. Now, Mr. Koehler, in arriving at the ultimate platting of this proposed easement, indicated in red on Plaintiff's Exhibit 3, what was your first step in arriving at this information? Was it the use of field notes?

A. For the easement, yes, is done through field work only.

Q. And then from your field notes what documents were prepared?

A. The documents here, laying on the desk, Exhibits 10 and 11.

Q. Exhibits 10 and 11?

A. That's correct.

Q. And then from the Plan and Profile you plotted this out, is [95] that correct?

A. That's correct.

Q. Is it also correct that from the Plan and Profile, which is a product of your field notes, the easement descriptions were drawn?

A. Yes, it is.

Q. And those are the descriptions by way of reference contained in Plaintiff's Exhibits 8 and 9, is that correct?

A. That is correct.

MR. MOON Now, if it please the Court, I have two overlays for Plaintiff's Exhibit 3 and my suggestion is that we mark them Plaintiff's Exhibits 3-A and 3-B.

THE COURT: Mark them that way.

(Plaintiff's Exhibits 3-A and 3-B marked for the purpose of identification)

Q. Now, Plaintiff's Exhibits 3-A and 3-B, which have been identified as such, are you familiar with these two items?

A. Yes, I am.

Q. Were they prepared under your direction and supervision?

A. Yes, they were.

Q. Were they prepared as an adjunct to Plaintiff's Exhibit 3?

A. Yes, they were.

Q. Would you please affix them to Plaintiff's Exhibit 3?

A. Yes, I will.

[96] Q. In the appropriate manner.

(Witness affixed overlays to Plaintiff's Exhibit 3)

Q. Now, let me ask you, how is it possible for you to affix these, 3-A and 3-B, overlays to Exhibit 3 at this particular point?

A. Through the – at this particular point the property ties involved in the option description.

Q. Did you make previous notations on both Exhibit 3 and the overlays?

A. Yes.

Q. Which permitted you to now affix them at the appropriate place?

A. Right.

Q. The lines drawn on the overlays themselves, that is, Exhibits 3-A and 3-B, what do they represent?

A. The centerline as described in the option and the right of way as described in the option.

Q. So the overlays described and reduced to platted form the option descriptions, is that correct?

A. That's right.

Q. And then under those we have what in red?

A. The easement descriptions.

Q. The easement descriptions as finally drawn?

A. That's correct.

Q. Now, do you note any variances between the option descrip- [97] tions and the easement descriptions in red?

A. Yes, I do.

Q. Could you please tell the Court all the various discrepancies involved? You might want to start with Parcel 6 Crossing 2, which is Exhibit 3-A over Exhibit 3.

A. The option description is not parallel to the existing alignment, there's an angle point left out of it. Other than that it checks in a pretty close manner. The property tie entering the property, therefore, will be different.

Q. Does the option description take any greater property than the easement description?

A. Yes, it does.

Q. Do you know approximately how much?

A. No, I do not.

Q. In terms of feet? Could you determine that from your notes?

A. I can determine it, yes.

Q. Could you refer to your notes?

A. Yes . . . approximately 40 feet farther into his property away from the existing alignment.

Q. In width, if we adhered to the option description?

A. That's right.

Q. If we adhered to the easement description how would that run up against the existing easement?

A. Run parallel to it, taking the minimum amount of land.

Q. If we adhered to the option description for Parcel 6 Crossing [98] 2 situation would it leave Mr. Holly in as far as unused land, land unsued by the easement?

A. There would be a space between the two existing easements that is not used.

Q. If we used the easement description for Parcel 6 Crossing 2 how would the easement lie as to the previously acquired easement in green?

A. It would be adjacent to it.

Q. They would abut?

A. They about abut.

Q. Drawing your attention to Parcel 6 Crossing 1, are there any discrepancies between the existing — strike that — between the proposed option description shown in the overlay, Exhibit 3-B, and the proposed easement description shown in red?

A. Yes, there is.

Q. And could you demonstrate to the Court what those differences are?

A. The overlap in the option onto the existing easement.

Q. So the option description actually overlaps onto the existing easement?

A. By the property ties involved to lay it out with, it does overlap.

Q. So that in this particular case if the option description were adhered to it would take less property from Mr. Holly than if the easement description were adhered to?

[99] A. That's correct.

Q. What about the section of Parcel 6 Crossing 1 north of State Route 2?

A. Essentially takes a little bit less, not near as much as the other crossing.

Q. The easement would take a little bit less?

A. The option takes less.

Q. The option takes less. Can you determine from your notes exactly how much less the option takes at that point?

A. At the north end of the property it will take — it will be in the same location at the road point. It's approximately, ah . . . approximately 10 foot at the southerly point.

Q. Prior to the by-pass?

A. Prior to the by-pass, right.

Q. So that at that point is it your testimony that the option would take 10 feet less of Mr. Holly's property than the easement?

A. That is correct.

Q. And at the northern extremity of Parcel 6 Crossing 1 the take would be exactly the same?

A. That's correct.

Q. Parcel 5, how does that differ between the easement and the option?

A. Ah . . .

Q. If any?

[100] A. There is a little bit of difference in the property tie at this end, that's all.

Q. Is there any difference in the amount of property which would be taken either under the option or under the easement?

A. Check that . . . there's less under the easement than there is in the option.

Q. Can you determine exactly how much less? That's the triangular parcel.

A. . . . approximately 20 feet along this property line.

Q. So less would be taken under the easement than would be taken under the option?

A. That's correct. I have an adjustment to make . . . no, I don't, either.

Q. Have you calculated overall, considering Parcel 6 Crossing 2, Parcel 6 Crossing 1, and Parcel 5, the difference between the land that would be taken under the option and under the easement, have you made that calculation?

A. The calculations are made, they are not listed here, though.

Q. Do you have those in your notes?

A. I doubt it.

Q. All right.

A. I'd have to check through . . . I'm almost positive I don't.

Q. As a surveyor and engineer do you have an opinion as to the difference between the total property taken under the easement and the total property taken under the option?

[101] A. No, I do not at this time.

Q. All right. Drawing your attention to Parcel 5, and also directing your attention to Plaintiff's Exhibit 8, which is the proposed easement, and Plaintiff's Exhibit 5, which is the option . . . I'm sorry, strike that, I'll start over again. Drawing your attention to Plaintiff's Exhibit 8, which is the proposed easement for Parcel No. 5, and Plaintiff's Exhibit 1, which is the option for Parcel 5, is there any difference in those two descriptions?

A. Yes, there is.

Q. And that's the difference which you have just demonstrated?

A. On here. (Indicating)

Q. On Exhibits 3 and 3-B. Now, as a surveyor would it be possible for you, taking the descriptions contained in both the option and the easement, to specifically locate the parcels described in the two exhibits, 1 and 8, on the grounds?

A. Yes, it is.

Q. And have you, in fact, done that?

A. Yes, we have.

Q. Is it also possible for you, as a registered surveyor, to take the descriptions contained in Plaintiff's Exhibit 1 and 8 and plot them out on a map?

A. Yes.

Q. And have you done that?

[102] A. Yes, we have.

Q. And Plaintiff's Exhibit 3 and 3-B are a result of that work?

A. Yes, it is.

Q. Drawing your attention now to Plaintiff's Exhibit 2, which is the option covering Parcel 6 Crossing 1 and Crossing number 2, as a surveyor is it possible for you to take the description contained in the option, Plaintiff's Exhibit No. 2, and specifically locate that on the ground?

A. Yes, it is.

Q. And have you, in fact, done that?

A. Yes, we have.

Q. Is it also possible for you, as a registered surveyor to take the descriptions contained in Plaintiff's Exhibit 2 and plot them on a map?

A. Yes, it is.

Q. And have you done that?

A Yes, we have.

Q. And is Plaintiff's Exhibit 3, 3-A and 3-B a result of that?

A. Yes, it is.

Q. Drawing your attention to Plaintiff's Exhibit 9, which is the proposed easement document for Parcel No. 6 Crossing 1 and 2, I'll ask you again, as a registered surveyor is it possible for you to take the descriptions contained in Plaintiff's Exhibit 9 and specifically locate them on the ground?

A. Yes, it is.

[103] Q. Have you, in fact, done that?

A Yes, we have.

Q. Is it possible for you as a registered surveyor to take the descriptions contained in Plaintiff's Exhibit No. 9 and plot them on a map?

A Yes.

Q. And have you done that?

A Yes, we have.

Q. And is Plaintiff's Exhibit 3, 3-A and 3-B a result of that work?

A. Yes, it is.

MR. MOON: No further questions.

• • •

[118] MR. COROGIN: We have no further questions.

THE COURT: Mr. Moon, just for the sake of a break here, will it take you long?

MR. MOON: I have one or two questions.

THE COURT: All right, go ahead.

REDIRECT EXAMINATION BY MR. MOON:

Q. Your attention to Parcel 5 —

A. Yes.

Q. — which appears to be Exhibits 8 and 1, is that correct?

A. That's correct.

Q. Are those descriptions drawn with reference to a particular right of way line or are they rather drawn to describe a particular parcel?

A. They are drawn to describe a right of way line.

Q. Now, the parcel – or the real estate described in those two options, does that describe a right of way with reference to a centerline or does it describe an entire parcel?

A. Describes an entire parcel.

Q. So is it your testimony that the reference to an existing right of way or parallel references would not be required as to those two documents and descriptions?

A. That's correct.

Q. They describe a triangular parcel?

A. They describe a triangular parcel.

Q. They do not describe a right of way with reference to a [119] centerline?

A. That's correct.

Q. Now, you stated earlier that Exhibits 3-A and 3-B relate to the options, Exhibit 3 relates to the proposed easement; is it not true that Exhibit 3 also relates to the options insofar as it's overlaid by Exhibits 3-A and 3-B?

A. Yes.

Q. Exhibits 3-A and 3-B would be meaningless without Exhibit 3 behind it?

A. That is true.

MR. MOON: No further questions.

THE COURT: Mr. Corogin?

RECROSS EXAMINATION BY MR. COROGIN:

Q. I think you said that one of the courses was left out of the option description?

A. No, I told you there was two different alignments and the new alignment has a new course.

Q. I though you said that one was omitted?

A. (No audible response)

MR. MOON: You have to answer rather than shake

THE COURT: We can't hear a shake – or we shouldn't be able to.

A. I didn't mean it to be an answer, I was sitting here thinking and . . . try to qualify that statement. As I say no, I [120] was talking of the option not including as many sides as the easement but it's not left out of the option.

Q. Well, there is an extra course of 58 feet in the easement description that is not in the option description?

A. That is true but there are two different alignments across that section of his parcel.

Q. So that you added a course of 58 feet to the easement instrument that was not in the option?

A. I believe if – I'm not sure of the 58 feet, but there is a course added.

Q. Did the option instrument say that you could add another course of 58 feet?

A. Not to my knowledge.

MR. COROGIN: I have no further questions.

REDIRECT EXAMINATION BY MR. MOON:

Q. By adding the course to the easement what you did was change the shape of the parcel, is that correct?

A. Changed the shape of the right of way.

Q. That portion you hope to acquire?

A. Right.

Q. So that what you have in your option is a valid described parcel, is that correct?

A. That's correct.

Q. What you have in your easement is a validly described parcel?

A. That's correct.

[121] Q. But they are not the same parcel?

A. They are not the same parcel, right.

MR. MOON: Nothing further.

THE COURT: Mr. Corogin?

MR. COROGIN: I have nothing further, Your Honor.

(Witness excused)

THE COURT: All right now, could I talk to counsel for just a moment?

(Off the record conference at the bench)

THE COURT: A five-minute recess.

(Short recess)

* * *

EXHIBIT L

IN THE COURT OF APPEALS OF
OTTAWA COUNTY, OHIO

CASE NO. 463

THE OHIO EDISON COMPANY,
Plaintiff-Appellant,

v.

JOHN HOLLY, JR.
Defendant-Appellee.

ASSIGNMENTS OF ERROR
AND
BRIEF OF APPELLEE

(Filed October 17, 1974)

ASSIGNMENTS OF ERROR

1. The Court erred in finding that Plaintiff-Appellant is entitled to recover the $3500.00 deposit in Defendant-Appellee's back account.

2. The Court erred in refusing to grant Defendant-Appellee's request for expenses and attorney fees.

STATEMENT OF THE CASE

The Plaintiff-Appellant Ohio Edison Company will be referred to as Edison and Defendant-Appellee Holly will be referred to herein as Holly.

Edison obtained Holly's signature to two options for transmission line easements. Subsequently, Edison requested Holly to sign easements with descriptions containing variances from the options, both as to length and width. Upon advise of counsel, Holly refused to sign these easements.

No request was made of Holly to sign easements containing the option descriptions.

Subsequently, Edison deposited $3500.00 in Holly's savings account and later filed a suit for specific performance.

The Court found a variance in the descriptions between the option and the tendered easements and refused specific performance.

The Court also ordered return of the $3500.00 deposited in Holly's account and denied Holly's request for attorney fees and expenses.

Notices of appeal were filed both by Edison and Holly.

ASSIGNMENT OF ERROR No. 1

THE COURT ERRED IN FINDING THAT PLAINTIFF-APPELLANT IS ENTITLED TO RECOVER THE $3500.00 DEPOSITED IN DEFENDANT-APPELLEE'S BANK ACCOUNT.

Edison is a public utility having the power of eminent domain. All contacts with Holly were under the threat of appropriation. Edison was not a willing buyer and Holly was not a willing seller when the option was signed. The depositing of $3500.00 in Holly's bank account was a voluntary act of Edison. This money could have been deposited with the Clerk of Courts and such a deposit

could not have been interpreted as a gift. The voluntary depositing of money into someone else's bank account must be interpreted as a gift by Edison to Holly.

Webster defined gift as "something given to show friendship, affection, support, etc." I see no affection and friendship here; however, there is a very good argument for support as will be seen by the next Assignment of Error.

ASSIGNMENT OF ERROR No. 2

THE COURT ERRED IN REFUSING TO GRANT DEFENDANT-APPELLEE'S REQUEST FOR EXPENSES AND ATTORNEY FEES.

The Court's attention is directed to 49 O Jur 2nd. 617. The author makes a statement as follows:

> "When a court of equity acquires jurisdiction of a cause, it will exercise it to the extent of administering that full relief which the case appears to demand."

Edison has caused Holly expense, loss of time and much worry. The trial court should have awarded expenses and reasonable attorney fees to protect an individual from a utility company.

Respectfully submitted,

/s/ THOMAS L. COROGIN,
Kline and Corogin
128 Madison Street
Port Clinton, Ohio 43452
Telephone 419-734-4142

[CERTIFICATE OF SERVICE OMITTED]

EXHIBIT M

IN THE COURT OF APPEALS OF
OTTAWA COUNTY, OHIO
SIXTH APPELLATE DISTRICT

Case No. 463

THE OHIO EDISON COMPANY,
Plaintiff-Appellant,

vs.

JOHN HOLLY, JR.,
Defendant-Appellee.

On Appeal From
The Court of Common Pleas of Ottawa County, Ohio

BRIEF OF APPELLANT
ON APPEAL

(Filed October 25, 1974)

STATEMENT OF THE CASE

Plaintiff, Ohio Edison Company, filed its Complaint in the lower Court May 24, 1973 asking for specific performance of two (2) Option Agreements for the conveyance of land executed by Defendant John Holly, Jr., April 4, 1972. Copies of the Option Agreements were attached to the Complaint as Exhibits A and B, pursuant to Civil Rule 10. Certain parts of Defendant's Answer of June

7, 1974, not material to this Appeal, were ordered struck. Defendant filed his Amended Answer July 26, 1973. On September 14, 1973 Plaintiff deposed Defendant and thereafter on December 17, 1973 moved the Court to compel discovery and impose sanctions pursuant to Civil Rule 37. Defendant next on January 7, 1974 moved for a Protective Order pursuant to Rule 26 and both the Rule 37 Motion of Plaintiff and the Rule 26 Motion of Defendant were heard January 30, 1974, but not journalized until July 30, 1974 at which time sanctions were denied.

Plaintiff filed its Motion for Summary Judgment February 12, 1974 together with an Affidavit, Memoranda of Law and two (2) depositions. Hearing was had March 22, 1974, in the lower Court on the Motion for Summary Judgment and thereafter in an Opinion filed March 29, 1974, the Court granted judgment to Plaintiff. On May 6, 1974 the lower Court reversed itself and entered judgment denying the Motion for Summary Judgment.

Defendant filed a Second Amended Answer May 14, 1974 and the case was tried to the Court without jury July 2, 1974. At the conclusion of Plaintiff's evidence, judgment was entered for Defendant denying specific performance and sanctions pursuant to Rule 37. From this latter Order of the Court entered July 30, 1974 and from the Court's earlier Order of May 6, 1974 denying Summary Judgment, Plaintiff appeals.

This Brief of Appellant is filed pursuant to App R 18 (a) and in response to Appellee's Brief filed herein October 17, 1974.

Pursuant to App R 16 (e) the following abbreviations and references will be followed throughout:

1. To the transcript: T

2. To the deposition of John Holly, Jr.: DH

3. To the deposition of James Lannen: DL

4. To the transcript of docket and journal entries: DJE

For clarification, Exhibits 1 and 2 to the Holly deposition are the same as Exhibits A and B attached to the Complaint and are the same as Exhibits 1 and 2 in the transcript. These are the two (2) Option Agreements the subject of this action and will be referred to hereafter only by reference to the transcript. Exhibits 4 and 5 to the Holly deposition are the proposed easements sought by Edison from Holly and are the same as Exhibits 8 and 9 to the transcript, and will be referred to hereafter only by reference to the transcript.

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The judgment of the trial Court of July 30, 1974 denying sanctions to Plaintiff pursuant to Rule 37 is an abuse of discretion and contrary to law.

ASSIGNMENT OF ERROR NO. 2: The judgment of the trial Court of May 6, 1974 denying Plaintiff's Motion for Summary Judgment is against the manifest weight of the evidence and contrary to law.

ASSIGNMENT OF ERROR NO. 3: The judgment of the trial Court of July 30, 1974 entering judgment for defendant at the conclusion of Plaintiff's case is against the manifest weight of the evidence and contrary to law.

ASSIGNMENT OF ERROR NO. 4: The judgment of the trial Court of July 30, 1974 requiring that taxes

of Defendant be first deducted from the original consideration of Three Thousand Five Hundred Dollars ($3,500.00) plus interest to be refunded to Plaintiff is contrary to law.

STATEMENT OF FACTS

On April 4, 1974 Defendant John Holly, Jr., hereinafter called Holly, entered into two (2) separate Option Agreements with Plaintiff Ohio Edison Company, hereinafter called Edison. A consideration of Twenty Dollars ($20.00) was then paid Holly for each Option, and Edison agreed to pay Holly Four Hundred Dollars ($400.00) and Three Thousand One Hundred Dollars ($3,100.00) respectively upon exercise of the Options. The said Agreements granted Edison the right and option to purchase certain rights-of-way and privileges in Portage Township, Ottawa County, Ohio on or before March 31, 1973 by depositing to the account of Holly at the American Bank, Port Clinton, Ohio, the total sum of Three Thousand Five Hundred Dollars ($3,500.00). Holly read and signed the Option Agreements April 4, 1974. He dictated the ultimate consideration to be paid upon conveyance, as stated in each Option Agreement. On March 26, 1974 Edison exercised the two (2) Options pursuant to the terms thereof by depositing Three Thousand Five Hundred Dollars ($3,500.00) to the account of Holly at the American Bank Port Clinton, Ohio. Holly refused to perform as agreed and Edison commenced an action in the Court of Common Pleas seeking to have the two (2) Option Agreements specifically performed.

During the pendency of the action in the Common Pleas Court, Edison on September 10, 1973 served upon Holly's Counsel of Record, Notice of an intent to take

Holly's deposition. In pursuance thereof the deposition was taken September 14, 1973. During the course of the deposition, (DH9-17) Holly refused to answer questions propounded to him by Counsel for Edison. After instructions by the Notary to answer, and a subsequent refusal to answer, the deposition was continued and concluded September 14, 1973. Holly did not waive the signing of his deposition and was first notified on September 25, 1973 that the deposition was fully typed and ready for signature. Holly did not sign the deposition. On October 25, 1973 the deposition was forwarded to Counsel for Holly for signature. Again on November 7, 1973 Holly was requested to sign the deposition. Subsequently Counsel for Edison repeatedly requested of Counsel for Holly that the deposition be signed. Finally on December 17, 1973 Edison filed a Motion to compel the signing of the deposition, and further to compel answers to the questions propounded during the taking of the deposition September 14, 1973. Holly filed a Motion for a Protective Order against the answering of those questions propounded at the deposition. The following day Ohio Edison filed notice of taking of the deposition of James Lannen, Vice President of the American Bank, Port Clinton, Ohio, but voluntarily withheld the taking of Lannen's deposition until after hearing of the Motions to compel discovery and for Protective Orders.

Hearing was held on the two (2) Motions January 30, 1974 and the Notice to take the Lannen deposition refiled by Edison February 1, 1974. At the Motions hearing of January 30, 1974 Counsel for Edison was permitted to introduce his time records regarding the Motion to compel discovery, but his efforts to testify as to the records were denied by the Court (T23-25). The Court permitted Edison to then propound certain questions to Holly

(T-22) and then issued an Order regarding questions to be propounded to James Lannen (T-25). A Judgment Entry was prepared after the hearing of January 30, 1974 and submitted to Counsel for Holly January 31, 1974. Counsel for Holly refused to approve the Entry February 4, 1974 (T-132). That Entry was transmitted to the Court July 3, 1974 but was never approved or included in the transcript of docket and journal entries. It lies now in the Clerk's file jacket and a copy thereof is attached to this Brief as Appendix A, together with transmittal correspondence and pencilled notes of the trial judge. At the trial on July 2, 1974 Plaintiff's Counsel was then permitted to testify as to time and expenses relating to the Motion to Compel Discovery and subsequent depositions of James Lannen (T123); however, sanctions were denied (DJE42-43).

Edison's Motion for Summary Judgment filed February 2, 1974 was argued to the Court March 22, 1974 (T26-46) and on March 29, 1974 the Court filed its Opinion granting Summary Judgment to the Plaintiff (DJE29). Edison then tendered to Holly's Counsel easements to be executed in pursuance of the ordered Summary Judgment (DJE30 and attachments thereto). Holly refused. Edison then tendered into Court easements drawn in strict pursuance of the Court's ordered Summary Judgment and containing the same real estate descriptions contained in the original Option Agreements (DJE30 and attachment thereto, compare T Exhibits 1 and 2). On May 6, 1974 the Court denied Summary Judgment (DJE36) and the matter was tried July 2, 1974.

Testimony adduced at the trial of July 2, 1974 will be treated in greater detail in argument, but the following facts developed without contradiction should be noted:

1. Defendant was the owner of the option land (DH5 and 6).

2. Defendant was familiar with utility companies, right of way agents and their procedures (T77-79, DH7, 8, 21, 24, et seq., 45 and 55).

3. Defendant demanded and got his price for the easements (DH7 and 8, T52 and 57).

4. There is no suggestion that Holly was ever subjected to duress, fraud or misrepresentation (DH 18, 19, 23, 37, 56, 28, 30, 33, 42 and 46, T65, see also Defendant's last Amended Answer, DJE 37).

5. Holly read, understood and signed the Option Agreements, (DH19, 35, 39, 40, 46, 20, 21, 34, 41 and 42).

6. Holly was never denied the right to consult with Counsel nor did he seek that right (DH27, T76-78, 83 and 84).

7. Holly was willing to execute the easements when presented to him (DH29, 30, 32 and 33, T-83 and 84).

8. The descriptions contained in the two (2) Options, T Exhibits 1 and 2, were definite and could be specifically located (T96, 101, 102, 115, 118, 120, 121, T Exhibits 3, 3a and 3b).

9. The descriptions contained in the two (2) easements, T Exhibits 8 and 9, were definite and could be specifically located (T94, 101, 102, 103, 120, 121, T Exhibits 10, 11, 3).

10. The Option descriptions called for greater total land than did the easement descriptions (T97, 98, 99, 100 and 111).

11. While a variance existed between the Option and

easement descriptions, the only variance was in width of the easement sought and not in length thereof (T98, 107, 111).

ARGUMENT

ASSIGNMENT OF ERROR No. 1:

The judgment of the trial Court on July 30, 1974 denying sanctions to Plaintiff pursuant to Rule 37 is an abuse of discretion and contrary to law.

The question of sanctions pursuant to Civ. R. 37, while not determinative of this case as a whole, is asserted and argued because of the peculiar difficulties encountered by Edison in both obtaining the deposition of Defendant Holly and in obtaining answers to particular questions propounded in that deposition.

As indicated in the Statement of Facts, the deposition of John Holly, Jr., was taken September 14, 1973 and certain questions at pages 9 thru 17 thereof were not answered although the witness was instructed to answer by the Notary. Civ. R. 37 provides the remedy for failure to answer in that a Motion may be directed to the Court in which the action is pending. Although the signing and submission of the deposition was repeatedly requested during the 2-1/2 month period withheld by Defendant, it was signed and submitted to the Court only after Edison filed a Motion to compel discovery on December 17, 1973. Edison's attempt to testify regarding its time and expenses occasioned by Holly's refusal to be deposed was refused by the Court at the hearing of January 30, 1974, although the Court did permit the limited questioning of Holly at that time, which limited questioning did not cure the original failure to be deposed for two (2) rea-

sons. (1) The questions originally propounded on September 14, 1973 were clearly within the scope of discovery and (2) The answers of January 30, 1974 do not ring with the spontaneity usually sought in oral depositions, especially where the original questions were propounded September 14, 1973. The discovery rules do not contemplate a 4-1/2 month period of meditation and reflecting between question and answer. In consequence of Holly's refusal to answer proper questions and his further long delay in signing and submitting his deposition, Plaintiff's Counsel was caused additional time and expense and should be compensated therefore as provided in Civ. R. 37 (a). See Exhibits 1 and 15 and T123 and 124. Further, the Motion of Defendant filed January 7, 1974 is merely a diversion calculated to confuse the central purpose of questioning Holly, which was to determine whether he had used any of the Three Thousand Five Hundred Dollars ($3,500.00) deposited to his account upon exercise of the Options. That Motion (DJE-16) asserts "repeated demands" for "information concerning his personal finances and bank accounts." No such repeated demands were ever made, and the record does not disclose any. At page 9 of Holly's deposition it had already been determined that Holly had only one (1) account at the American Bank, Port Clinton, Ohio and the questioning had become specific as to the American Bank account before Counsel for Holly ever interposed his first objection. If Edison had deposited the Option money to Holly's account at the American Bank, as alleged in the Complaint, and if Holly acknowledged without objection that he had only one (1) account at the American Bank, then it would seem reasonable to inquire whether Holly withdrew or used any of that money, or used any of the interest derived from it. The questions

were proper, the refusals and delays were not, and Edison should be compensated pursuant to Civ. R. 37 for delay and expense occasioned by Defendant's actions.

Civ. R. 26 (b) (scope of discovery) provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant . . . it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated *to lead* to the discovery of admissible evidence." (emphasis added).

A reading of pages 9 thru 17 of the Holly deposition indicates that the Attorney for Defendant made no objection based upon privilege. The rules of discovery are to be construed liberally and Defendant should have answered the propounded questions as they related directly to allegations of the Complaint. See paragraphs 3 of the First and Second Causes of action, DJE1. Had the propounded questions not related to specific allegations of the Complaint, discovery still could have been compelled under these new liberal rules, and under concepts developed during Ohio's long experience with code pleading and discovery allowed thereunder, *Ex parte Oliver,* 173 Ohio St. 125, 1962, and *Bevan* v. *Krieger,* 289 U.S. 459, a case on appeal fro mthe Ohio Supreme Court, wherein Justice McReynolds says: "if the . . . (discovery sought) . . . are irrelevant to the litigation . . . (the party) can amply protect itself by objecting to their admission at the trial of such litigation." See also *Stokes* v. *Journal Company,* 26 Ohio Misc. 219, Cuyahoga County Common Pleas Court, 1970, wherein the Court defines "privilege" and "bad faith" as the only grounds for refusal to answer questions propounded during the taking of the deposition. The record in the instant case discloses neither element.

As to the question of sanctions, *State Auto Mutual Insurance Company* v. *Chrysler Corporation,* 36 Ohio St. 151, 304 N.E. 2d 891, 1973, ought to be dispositive of the issue at hand. In that case sanctions (costs) were permitted for delays and failure to fully answer Interrogatories, even though the propounding party failed to avail himself of the procedures Edison invoked pursuant to Civ. R. 37a. The directions of the Rule as applied by the Supreme Court of Ohio are mandatory:

> "Civ. R. 37 permits a party to move for an Order compelling an answer, or an Order compelling inspection in accordance with a request, and *requires* the Court to award expenses to the moving party if the Motion is granted." (emphasis added).
>
> "Sanctions are a necessary element in the scheme for liberal discovery. A party who resists discovery without justification must pay reasonable expenses, including Attorney fees, which are incurred by the party seeking discovery." Syllabus 2, *Hlavin* v. *Plechaty*, 28 Ohio App. 2d 43, Cuyahoga County, 1971.

The trial Court relied upon *Sexton* v. *Sugar Creek Packing Company,* 38 Ohio App. 2d 32, Franklin County, December 11, 1973, in its ruling that Defendant had violated no Order of the Court, and therefore was not subject to sanctions. *Sexton,* a Court of Appeals Opinion decided December 11, 1973, flies in the face of *State Auto Mutual* decided by the Ohio Supreme Court December 19, 1973, and the overruling of the former is implicit in the language of the latter case.

ASSIGNMENT OF ERROR No. 2:

The judgment of the trial Court of May 6, 1974 denying Plaintiff's Motion for Summary Judgment is against the manifest weight of the evidence and contrary to law.

Plaintiff filed its Motion for Summary Judgment February 12, 1974 (DJE22) and thereafter with leave of Court (DJE23) filed in support of said Motion an Affidavit of Paul C. Moon (DJE24), the deposition of Defendant John Holly, Jr., (DJE15), the deposition of James Lannen, Vice President, American Bank, Port Clinton, Ohio (DJE26), and a Memorandum in support of the Motion for Summary Judgment.

On March 29, 1974 the Court, apparently impressed with the Motion and Arguments of Plaintiff, filed an Opinion granting Summary Judgment to Plaintiff (DJE 29). Then by Order filed May 6, 1974 (DJE36) the Court reversed itself denying Summary Judgment and stating as its sole reasons for such denial "a sufficient degree of ambiguity concerning the legal property description." The Court did not state what those ambiguities were. Manifestly, the descriptions in the Options are not ambiguous. We have treated that matter in some detail at pages 8 and 9 of the Statement of Facts, and the Court is referred thereto. See especially the testimony of Larry G. Koehler, Registered Surveyor, at pages 101, 102, 115, 118, 120 and 121 where uncontraverted testimony demonstrates that the real estate descriptions contained in the Options are susceptible of platting and specific location.

As to the general question of Summary Judgment as it relates to Plaintiff's right thereto in this case, the pleadings filed herein, which are to be considered by the Court,

contain as Exhibits (to the Complaint) the two (2) written Option Agreements which are the subject of the within action for specific performance.

Rule 56 of the Ohio Rules of Civil Procedure requires the Court to enter judgment for the moving party "forthwith if the pleading, depositions . . . affidavits . . . show that there is no *genuine issue* as to any *material fact* and that the moving party is entitled to judgment *as a matter of law.*" Further, "a Summary Judgment shall not be rendered unless it appears from such evidence *and only therefrom,* that reasonable minds can come to but one conclusion and that conclusion is adversed to the party against whom the Motion for Summary Judgment is made . . ." Emphasis added.

The documents submitted by Plaintiff establish conclusively the following:

1. Option (Exhibits to Complaint) — an unambiguous agreement for the conveyance of land.

2. DL — consideration as called for in the Option was deposited in accordance with the terms of the Option to the account of Defendant.

3. Moon Affidavit — said consideration consisted of monies of the Plaintiff.

4. DH — Defendant read and signed said Option Agreements without duress, fraud or misrepresentation on the part of Plantiff or any party.

As to contracts for the conveyance of land, specific performance is the exclusive remedy for the purchaser, and may be had as a matter of right upon a proper showing. 49 O Jur 2d 566. Originally such relief was within the "sound discretion of the chancellor" but now "the specific

performance of a contract to convey land is as much a matter of course as an action of damages for its breach." 11 Williston on Contracts 666. If the contract or Option is free from ambiguity, then there is no issue of fact, the meaning of the contract is a question of law to be determined solely from the language of the Option and Summary Judgment will be entered. *Dale* v. *Preg,* 204 F 2d 434, 9th Cir. 1953.

The last mentioned case deals with a situation and written contract similar to that now before this Court, although the language of the contract is *Preg* was less specific than herein, and the Court found no "genuine dispute of fact on any material issue" and entered Summary Judgment.

> "The pertinent language of the Agreement is that appellants' do promise and agree . . . that at any time within two (2) years from the date hereof . . . they will re-convey . . .' We find no ambiguity in this language. We know of no words more plainly denoting a contractual undertaking 'promise' and 'agree'."

If a Defendant signs a written contract, it is presumed that there was a meeting of the minds, and the contract is made whether Defendant intended it or not. 11 O Jur 2d 264. The above principle obtains when a party signs without reading. Manifestly, he may not avoid the contract if he both read and signed the contract, and freely admits thereto. See DH pages 20, 21, 34, 40, 41 and 42.

Defendant is the owner of the land in question and competent to convey, DH pages 5 and 6.

The adequacy of the consideration is not challenged and in fact Defendant relates that the option price of Three Thousand Five Hundred Dollars ($3,500.00) was

a negotiated consideration established by him, not by Edison. DH, Page 22.

There are abundant admissions by Defendant in his deposition that he was not deceived, threatened, nor coerced, that he was familiar with right of way agents, got along well with Mr. Campbell (the agent in question), and had no complaint with the agent's behavior. See DH pages 7, 8, 18, 21, 22, 23, 24, 27, 42 and 56.

The deposition of Defendant Holly contains abundant admissions by him which compel the entry of Summary Judgment for the Plaintiff. There is no genuine issue of fact to be decided, no material issue to be resolved; Defendant read and signed the Options, he was not coerced, and he is presumed to have understood the terms of the Options, which he did in fact understand. He can not now escape the consequences of his knowing act.

"A person of full age, in possession of all his faculties and able to read and write, who signs an instrument and remains acquiescent to its operative effect for some time, may not, in an action by him to cancel such instrument, escape the consequences thereof by claiming he did not read it or that he relied upon the representations of another as to its contents or significance." *Roback* v. *Roback,* 68 O L Abs 310, Court of Appeals (6th District, sitting by designation to the 8th District,) 1953. See also *McAdams* v. *McAdams,* 80 Ohio St. 232.

ASSIGNMENT OF ERROR No. 3:

The judgment of the Trial Court of July 30, 1974 entering judgment for Defendant at the conclusion of Plaintiff's case is against the manifest weight of the evidence and contrary to law.

The Court's Order above cited makes certain findings of fact. These findings appear to begin midway at page 3 of the Judgment Entry (DJE43) and run over toward the end of page 4. Appellant will endeavor here to isolate those findings, deal with them separately, and interprets them to be as follows:

1. Plaintiff did not request of Defendant a conveyance in the descriptive terms of the Options (Exhibits 1 and 2); the converse being that Plaintiff requested that Defendant convey by the descriptive terms contained in the proposed easements (Exhibits 8 and 9).
2. There are variances in the length and width of the described property between the option and easement descriptions.
3. Plaintiff's cause requesting conveyance of the Option descriptions has been abandoned by Plaintiff.
4. The Option descriptions are indefinite.
5. Defendant will be required to consent to a future description not contained in the Options.

FINDING NO. 1:

Plaintiff did not request of Defendant a conveyance in the descriptive terms of the Options (Exhibits 1 and 2); the converse being that Plaintiff requested that Defendant convey by the descriptive terms contained in the proposed easements (Exhibits 8 and 9).

After asserting that Plaintiff did not demand conveyance pursuant to the Option descriptions (Exhibits 1 and 2)

but rather demanded that Defendant convey by the easement descriptions (Exhibits 8 and 9), the Court goes on in the second paragraph of page 4 of the Order to comment that a specific demand should not be required as the Complaint or suit itself is a sufficient request. Manifestly, it is the ultimate request. But Plaintiff did demand that Defendant convey in the terms of the Options, and a conveyance drawn in the terms of Exhibits 1 and 2 was actually submitted to the Court and filed with the Clerk April 15, 1974, months before the trial (DJE32 and attachment thereto).

It is not, however, a condition precedent to specific performance that a vendee seeking specific performance first demand or request conveyance from the vendor. It is the vendor's duty to convey; it is the vendee's duty to tender the purchase price.

> "The general rule is that a party seeking performance must show performance or a tender of performance on his part." 49 O Jur 2d 519 "For instance, the payment of the amount of the purchase money actually due is prerequisite to the enforcement of the contract of conveyance, and a deed can not be demanded until such purchase money has been paid or so tendered." 49 O Jur 2d 520
>
> "An actual tender of the purchase price by the vendee in a real property contract is not necessary where from the acts of the seller, or from the situation of the property, it would be wholly nugatory and meaningless." 49 O Jur 2d 525 "In any case where the complainant has made a formal tender, or where tender has been excused in whole or in part, the fact that he did not bring the tender into Court will not bar relief." 49 O Jur 2d 600.
>
> "If tender is once refused, the Complainant is not required to again tender performance." 49 O Jur 2d 527

Even though Ohio Edison had fully tendered the purchase price pursuant to the terms of the Agreement, it was appropriate that the intended instrument of conveyance be filed with the Clerk and offered to the Court. *Maus* v. *Swartz,* Court of Appeals, Auglaize County, 13 O. L. Abs. 54, 1932 and *Tiffin* v. *Shawhan,* 43 OhioSt. 178, 1885.

FINDING NO. 2:

> There are variances in the length and width of the described property between the option and easement descriptions.

This Finding is clearly not supported by the record. The testimony of Larry G. Koehler, Registered Surveyor, uncontradicted, as previously documented in this Brief, shows conclusively that while the Option descriptions *vis a vis* the easement descriptions varied in width, they did *not* vary in length (T98, 107, 111).

FINDING NO. 3:

> Plaintiff's cause requesting conveyance of the Option descriptions has been abandoned by Plaintiff.

There is no evidence in the entire record to indicate Ohio Edison abandoned its cause for conveyance of the optioned parcels. No suggestion of that ever came out, nor was the term "abandonment" ever used except in the Court's final Order and in the Court discussion thereof following the July 2, 1974 trial. If Ohio Edison had abandoned its cause, why was the document referred to above (DJE 32) submitted to the Court on April 15, 1974? In adducing testimony as to the definiteness and location of the descriptions contained in Exhibits 1, 2, 8 and 9, Plaintiff was not abandoning 1 and 2 in favor of

8 and 9 but was attempting to demonstrate what it did demonstrate; that all descriptions, 1, 2, 8 and 9, were definite and could be located and that 8 and 9 took less land than 1 and 2.

FINDING NO. 4:

The Option descriptions are indefinite.

As previously demonstrated herein, the Option descriptions were not indefinite. (T96, 101, 102, 115, 118, 120, 121 Exhibits 3, 3a and 3b).

FINDING NO. 5:

Defendant will be required to consent to a future description not contained in the Options.

In setting forth this final Finding, the trial Court seems concerned that Ohio Edison proffered for signature by Holly two (2) documents, the first (DJE 30 and attachment thereto) containing the Exhibit 8 and 9 descriptions and the second (DJE32 and attachment thereto) containing the Exhibit 1 and 2 descriptions. Edison's position is and always has been the following: the Options, Exhibits 1 and 2, are specifically enforceable, and by virtue of the option language, "the exact location of the right-of-way is to be designated by Grantee after its final surveys are made and in any event before the construction of the lines shall be commenced." Edison is entitled to conveyance in the language of Exhibits 8 and 9. The Exhibits 1 and 2 descriptions if enforced will take greater land than the Exhibits 8 and 9 language if enforced, and the former will be to Holly's greater detriment. Such a contract is specifically enforceable in Ohio. Where the contract to be specifically enforced provides a method

whereby the final real estate description may be determined, so long as the final determination does not exceed the intent of the original contract, equity will enforce the contract of sale. *Miller* v. *Mining Company,* Court of Appeals, Jefferson County, 1914 2 O. L. Abs. 588.

In an unreported case from Clark County, that Common Pleas Court rendered a judgment upholding the Option and language questioned in the instant case. A copy of the Option there upheld is attached as Appendix B and the Court's decision is attached as Appendix C. *Ohio Edison Company* v. *Emmet W. Morris, et al.,* Case No. 64511, Court of Common Pleas, Clark County, 1968.

But, Edison will accept a conveyance in the language of the Options.

There are five (5) decisions which constitute the primary body of case law in Ohio wherein a Court has refused to specifically enforce a contract for the sale of land because of indefiniteness of description. A brief insight into these cases, by inversion, should assist this Court in determining that the instant case is not one of those which in Ohio will fall for indefiniteness of description.

1. *Standfield* v. *Fisher,* 37 Ohio App. 2d 48, Clinton County, 1973. The offer described the property as "the seminole stock farm." The acceptance spoke in terms of "my farm." The contract was not specifically enforceable.

2. *Maud* v. *Maud,* 33 Ohio St. 147, 1877. No land described at all and the contract failed.

3. *Schmidt* v. *Weston,* 150 Ohio St., 293, 1948. Land was described as being in a nonexistent township and the contract failed.

4. *Steeg* v. *Scharenberg,* 20 Ohio App. 2d 151, Sum-

mit County, 1969. Land was described as "some land" . . . "adjacent to lot 16" and the contract failed.

5. *Meineke* v. *Schwepe,* 93 Ohio App. 111, Warren County, 1952. The wrong township was described and the contract failed.

ASSIGNMENT OF ERROR No. 4:

The judgment of the trial Court of July 30, 1974 requiring that taxes of Defendant be first deducted from the original consideration of Three Thousand Five Hundred Dollars ($3,500.00) plus interest to be refunded to Plaintiff is contrary to law.

Assignment of Error No. 4 is an alternative assignment and should be decided by the Court of Appeals only in the event assignments 2 and 3 are found not well taken. This Assignment is also in direct response to appellee's Brief filed October 17, 1974, wherein appellee suggests that he is the donee of a gift from Ohio Edison Company. Appellee cites no law in support of that proposition and it is respectfully urged upon the Court that there is no law to support the same.

"If specific performance is denied in whole or in part . . . the Court will retain the case and issue such decree as justice and equity will sanction, in order to avoid other actions and to settle the rights of the parties." 49 O Jur 2d 609.

When a Court denies specific performance of a contract for the sale of real estate, the Plaintiff vendee is entitled to have repaid to him all that he had paid to the Vendor, together with interest from the time of such payment to the time of repayment, *Kamarsic* v. *Smith,* 21 O.C.C. NS 36, Cuyahoga County 1905. See also *Varga* v. *Karochai,* 6 O.L. Abs. 484, and *Rosenburg* v. *Callam,* 37 O.L. Abs. 9.

The lower Court ordered the Three Thousand Five Hundred Dollar ($3,500.00) consideration returned to Ohio Edison plus interest less taxes. There is no authority for the deduction of taxes, nor is there in the record a determination of what those taxes are.

CONCLUSION

Sanctions should be awarded to Plaintiff due to Defendant's delays and refusals, and the additional time and expense occasioned Plaintiff thereby.

The Court's Orders denying Summary Judgment and entering Judgment for Defendant at the end of Plaintiff's case should be set aside and Summary Judgment entered for Plaintiff pursuant to App. R. 12 (C).

Should this Court find Assignments of Error No. 2 and 3 not well taken, Plaintiff should not be required to pay Defendant's taxes upon income earned upon the Three Thousand Five Hundred Dollar ($3,500.00) consideration paid Defendant, and that $3,500.00 consideration should be returned to Plaintiff together with legal interest (6%) thereon from the day of deposit.

Respectfully submitted,

/s/ PAUL C. MOON
Attorney for Plaintiff

Paul C. Moon
Moon, Moon and Noblitt
222 East Second Street
Port Clinton, Ohio 43452
Phone 732-3145

[CERTIFICATE OF SERVICE OMITTED]

IN THE
COURT OF COMMON PLEAS OF
CLARK COUNTY, OHIO

CASE NO. 64511

OHIO EDISON COMPANY,

Plaintiff,

vs.

EMMET W. MORRIS, ET AL.,

Defendant.

DECISION

HUSTED, J.

This matter is before the Court on the plaintiff's petition wherein it seeks a decree of specific performance of a contract which it alleges was entered into by it and the defendants, and upon the answer of the defendants.

Before the case was heard by the Court on its merits, counsel for the parties stipulated the following: "The record previously made in the case in connection with the motion of the plaintiff for temporary injunction, as disclosed by the transcript of proceedings, is admissible and shall constitute evidence in the hearing on the issue of specific performance, subject to the following corrections and deletions: Page 2, the word "east" is changed to "west" in reference to the Ohio Edison transmission line in the vicinity of Springfield. The last question and answer on Page 2 and the first four questions and answers on Page 3 are not included in the stipulation. The third and

fourth questions and answers on Page 5 are not included in the stipulation. The last three sentences of the answer at the top of Page 12 are not included in the stipulation. All of the questions and answers on Page 15 and the two answers and first question at the top of Page 16 are not included in the stipulation. Exhibit "G" is not included in the stipulation. Exhibits "A", "B", "C", "D", "E", and "F" are included in the stipulation and are admitted in evidence in this hearing."

The defendants, having timely requested the Court to state in writing the conclusions of fact found separately from the conclusions of law, the Court does so as follows:

Findings of Fact

1. The evidence preponderates that the agent of plaintiff paid defendants the sum of one dollar as receipted for in the option agreement executed June 22, 1967.
2. That the plaintiff corporation exercised its right of way option to purchase an easement on August 1, 1967 by tendering its check in the amount of three thousand dollars to the defendants.
3. That the right of way option which defendants executed provided that: "The exact location of said right of way is to be designated by grantee after its final surveys are made, and in any event before the construction of said lines shall be commenced."
4. That there is not a substantial variance between the description of the right of way as set out in the option and the description of the right of way as set out in the easement to the degree that it was not contemplated by the parties in the right of way option.
5. That the printed matter in the right of way option clearly sets out the rights reserved to defendants

to use the land within the right of way, together with the restrictions as to such use.

6. That the right of way option contained no covenant that the defendants would warrant and defend the title.

Conclusions of Law

1. A binding contract was entered into by the parties on June 22, 1967 as alleged in plaintiff's petition, and was in existence on August 1, 1967.

2. The plaintiff tendered the purchase price of three thousand dollars on August 1, 1967, that being the amount agreed upon and as set out in the right of way option.

3. The variance in description of the right of way, as set out in the right of way option and easement, is not such a substantial variance so as to render the contract entered into by the parties unenforceable.

4. The provisions in the right of way option clearly set out the rights reserved by defendants, together with the restrictions as to the use of the land by defendants. 11 O. Jur. 2d, Contracts, Section 19, provides in part as follows: "It is a general rule as to the binding effect of contracts that in the absence of fraud or mutual mistake, a party who executes a written contract cannot say that he was ignorant of its contents and thus escape liability. The party drawing the contract is under no obligation to state the terms thereof to the other party where the other party is able to read the contract. It is a well-established principle that it is the duty of every person who enters into a contract, to learn its contents before he signs it . . ."

5. The provision in the easement as finally prepared of a covenant requiring the defendants to warrant and defend the title does not relieve the defendants of their obligation to execute an easement in conformance with the provisions and variances as contemplated by the parties in the right of way option contract.

6. The plaintiff is entitled to a decree of specific performance of its contract with defendants under the terms and provisions of the right of way option.

. . . . . .

Trial Judge

EXHIBIT N

IN THE
COURT OF APPEALS OF OTTAWA COUNTY, OHIO
SIXTH APPELLATE DISTRICT

Case No. 463

OHIO EDISON COMPANY,
Plaintiff-Appellant,

vs.

JOHN HOLLY, JR.,
Defendant-Appellee.

BRIEF OF APPELLEE

(Filed November 8, 1974)

* * *

ASSIGNMENT OF ERROR NO. 1

In answer to Assignment of Error Number One of Ohio Edison, Appellee Holly wishes to point out that Ohio Edison attempted to take the deposition of Holly wherein he was asked questions regarding his personal finances. Apparently the object of the deposition was to find out whether Holly knew that Ohio Edison deposited $3,500.00 in a bank account at the American Bank. However, Ohio Edison did not confine itself to that question, but instead, asked Holly about bank accounts in general. At this point, Holly's counsel objected and refused to allow Holly to answer questions regarding his personal finances.

At a later date, both parties appeared in court, Ohio Edison asking that the Court order Holly to answer the questions and Holly asking for a protective order. The Court granted both of these motions in part and allowed Holly to answer certain questions at this hearing. It developed that Holly did not know the answer to the questions propounded and as a result, in order for Ohio Edison to get the information it wanted, a deposition was taken at the bank in question. Civil Rule 37 is designed to cover those situations where a proper question is asked and the party refusing to answer knows the answer. Here this is not the case. First, the line of questioning was improper and second, Holly did not know the answer.

The fact that Plaintiff could not prove its point by cross examination of Holly is no reason to attempt to enforce sanctions against him.

Apparently, in this deposition Ohio Edison was attempting to show that it deposited $3,500.00 to John Holly's bank account. After 45 pages of questioning, the question was finally asked, and Mr. Holly answered it.

ASSIGNMENT OF ERROR NO. 2

Judgment of the Trial Court was proper for grounds other than those stated by the Court. The option, being a contract, in order to be valid must represent a meeting of the minds. Mr. Holly testified in his deposition (page 44) that he wanted legal advice, but was advised that this document was only an option. He testified (page 46) that he wanted advice because he knew Ohio Edison did not perform its agreements and in the past had caused him a lot of damage. He was in effect advised that advice was not necessary at this point and was told that

Ohio Edison was not sure whether this option was necessary. (Holly's deposition, page 40).

In addition, Holly wanted damages to residue and was under the impression that these would be paid at the exercise of the option. (Holly's deposition, pages 49 and 50). Holly also believed that $3,500.00 was to be paid for the strip of land taken and that there would be additional payments, one for damages to residue and the other for crop and physical damage. (Holly's deposition, page 50).

A public utility must pay to the property owner compensation for the land taken and damages, if any, to residue. These protections are afforded not only by Article XIII, Section 5 of the Ohio Constitution, but by Section 163.01 et seq. of the Ohio Revised Code. The fact that Holly was told that he did not need advice at this point, but could seek advice at a later date substantiates Holly's understanding that there would be a closing at a later date wherein he was paid for damage to residue in addition to compensation for the land taken.

It is interesting to note that by using an option wherein there is no requirement for witnesses and acknowledgement, the public utility tried to obtain an easement which requires two signatures and an acknowledgement. (Holly deposition, page 43). The circumstances surrounding the signing of this option also tend to substantiate Holly's belief that this was merely an option and that Ohio Edison did not know whether it would need the land or not.

Further arguments regarding this Assignment of Error will be found in the arguments under Assignment of Error No. 3.

ASSIGNMENT OF ERROR NO. 3

I. SPECIFIC PERFORMANCE CANNOT BE USED TO COMPEL A CONVEYANCE WHERE A PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW.

Specific performance is available to a Plaintiff only if an action at law will not afford an adequate remedy for refusal to convey. 49 O Jur. 2nd., 556 § 54. Specific Performance to Compel Conveyance of Realty. The Court will note that the idea behind specific performance is to enable the purchaser to acquire the specific real estate contracted for. The Court is well aware of Section 163.01, et seq. of the Ohio Revised Code which provides an adequate legal remedy for Plaintiff to acquire not only real estate promised to be conveyed, but any real estate desired.

II. THE OPTION DESCRIPTION VAGUE AND INADEQUATE.

The description in the option is followed by a statement that the exact location of the right of way is to be designated by the Grantee. This provision gives the owner no voice whatsoever in the establishment of the description and gives the Grantee an unrestricted right to take whatever real estate it desires. This is grossly unfair when one considers that the property owner has been committed to a definite monetary figure.

There was a changeover by Ohio Edison from a rod description in the option to a description by foot in the tendered easements. The description of the option cannot be changed. *Stanfield* v. *Fisher,* 37 Ohio App. 2nd, 48 (Clinton County Court of Appeals 1973). *Steeg* v. *Scharenberg,*

20 O. App. 2nd, 151 (Summit County Court of Appeals, 1969).

Schmidt v. *Weston,* 150 O.S. 293 (1948), holds as follows:

> "1. In an action for specific performance of a contract to sell real property, parol evidence may not be admitted to furnish or correct a description of the property in the memorandum.
>
> 2. Parol evidence may be resorted to for the purpose of applying the description contained in a writing to a definite piece of property and to ascertain its location on the ground, but never for the purpose of supplying deficiencies in a description otherwise so incomplete or incorrect as not to identify the land. The description must be in itself capable of application to something definite before parol testimony can be admitted to identify any property as the thing described.
>
> 3. A contract for the sale of land must definitely point out the particlar land to be conveyed or must furnish the means of identifying it with certainty. (*Kling, Admr.* v. *Bordner,* 65 Ohio St., 86, approved and followed.)"

Following the above Supreme Court rule of law, Ohio Edison cannot offer oral testimony to add to or correct the description shown in the option.

The above mentioned deficiencies and attempted changes in description are sufficient to prevent the Common Pleas Court from granting specific performance.

The Trial Judge made a finding that Ohio Edison abandoned its option rights because it never demanded that Holly execute an easement in accordance with the option description. Prior to the filing of the suit, Ohio Edison asked Holly to sign certain documents which Holly refused to sign on advice of Counsel. These documents

did not have the option descriptions nor did they make provisions for damage to residue and physical damage caused by construction and maintenance. Holly properly refused to sign these documents.

At one point in the proceedings, the Trial Court did say it would order specific performance. However, after examining the easement instruments and realizing there were material differences, the Court assigned the matter for trial.

Neither the option nor the tendered easements contained a definite description of the installation to be installed upon this property. The type of line according to the plans is a high tension or high voltage line, but no mention is made of high voltage in either document.

The descriptions set forth in the options are inadequate and grant an unrestricted right to take whatever real estate Ohio Edison desires. There is no reciprocal provision allowing for additional payment to Holly if additional land is taken.

The case of *Ohio Edison Company* v. *Morris* from the Common Pleas Court of Clark County is not controlling here for many reasons. One is that being an unreported case, it is difficult, if not impossible to make any comparisons. Second, it is a lower court decision and as I understand it, was appealed, but for some reason the appeal was dismissed. Lastly, on the issue of substantial variance, it appears that the Court is saying that a variance is a question of fact to be decided by the trial court. That court apparently applied the rule of law set forth in Ohio Edison's brief on page 25 that the trial court has a right to refuse specific performance because of a variance of description. The trial court found variance and its decision should be upheld.

[PROOF OF SERVICE OMITTED]

EXHIBIT O

IN THE COURT OF APPEALS OF
OTTAWA COUNTY OHIO
SIXTH APPELLATE DISTRICT

Case No. 463

THE OHIO EDISON COMPANY,
Plaintiff-Appellant,

vs.

JOHN HOLLY, JR.,
Defendant-Appellee.

REPLY BRIEF OF APPELLANT

On Appeal From
The Court of Common Pleas of Ottawa County, Ohio

(Filed November 19, 1974)

* * *

ARGUMENT

Briefly, in reply to Appellee, Appellant will treat only the question raised in Appellant's Brief at pages 5 thru 8: whether an appropriation is an adequate remedy at law negating a cause of action for specific performance. This is the only defense asserted by Appellee in his pleadings, and goes to the crux of the case. All other matters raised in Appellee's Brief are ancillary to the above question or were not asserted in pleadings in the Trial Court.

Appellee maintains in his Answer Brief that specific performance of contracts is not available to any party endowed by the laws and constitution of any jurisdiction with the right of Eminent Domain. To support this principle Appellee says simply that Eminent Domain is an adequate remedy at law, and therefore specific performance is not available. Appellee cites no case from any English speaking jurisdiction to justify that position, and in fact it is doubtful that precedent exists any where for such a revolutionary assertion. To favor Appellee's position would be to announce for the first time in Western Jurisprudence that public utilities may contract with private individuals for the purchase of land only at the risk that such contracts may later be avoided at the option of the individual. Such is not now, nor has it ever been the law. The right to contract without the concurrent power to enforce that contract under just circumstances is meaningless.

The legal remedy available to a party which will negate equity jurisdiction must be a remedy recognized at *common law* (emphasis added) .20 O Jur 2d 52. The right of a corporate body, public or private, to exercise the power of Eminent Domain "does not exist unless it has been expressly delegated by statute . . ." 19 A O Jur 2d 98. Consequently, it cannot be argued that the power of Eminent Domain as it pertains to corporations, or otherwise, is a remedy recognized at common law.

Further, assuming arguendo that Eminent Domain is a recognized remedy at common law, such a remedy in order to negate equity jurisdiction must be "plain, adequate, and complete." 20 O Jur 2d 54.

The Ohio Supreme Court established years ago in persuasive language the principle that the powers of Eminent Domain do not present a full, adequate and complete

remedy at law, and may not be invoked to defeat the prior contractual rights of the parties.

> "Any construction of that section (Eminent Domain) which would permit it to be employed as an instrument to destroy the obligation of an existing contract in all respects valid and subsisting would to that extent render that section (Eminent Domain) unconstitutional.
>
> "We are therefore of the opinion that the owner of this real estate has rights which may not be pleaded effectively in the compensation assessment proceeding, and that the legal remedies provided by the statutes are not full, adequate and complete." *Sargent* v. *Cincinnati,* 110 Ohio St. 444 at 457, 1910.

That the land owner in the instant case seeks to invoke the appropriation statute to avoid the contract, while novel, should not alter the law stated above and its application to this case.

Respectfully submitted,

/s/ PAUL C. MOON
Attorney for Appellant
Paul C. Moon
Moon, Moon and Noblitt
222 East Second Street
Port Clinton, Ohio 43452
Phone 732-3145

[PROOF OF SERVICE OMITTED]

EXHIBIT P

Article II, Secton 28 Constitution of Ohio, 1851:

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

EXHIBIT Q

Article XIII, Section 5 Constitution of Ohio, 1851:

No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

EXHIBIT R

IN THE
COURT OF COMMON PLEAS,
OTTAWA COUNTY, OHIO

Case No. 18085

OHIO EDISON COMPANY,
47 North Main Street, Akron, Ohio 44308
Plaintiff,

vs.

JOHN HOLLY, JR.,
1718 State Street, Port Clinton, Ohio 43452,
Defendant.

COMPLAINT

(Filed October 11, 1974)

FIRST CAUSE OF ACTION

1. On or about April 4, 1972, Plaintiff and Defendant entered into an agreement in writing, a copy of which is hereto annexed as Exhibit A.

2. In accordance with the provisions of said agreement, Plaintiff tendered to Defendant the purchase price and requested a conveyance of the land, but Defendant refused to make the conveyance.

3. In accordance with the terms of said agreement, Plaintiff has deposited the full purchase price to the account of the Defendant at the American Bank, Port Clinton, Ohio, and a copy of the deposit slip is attached hereto as Exhibit C.

SECOND CAUSE OF ACTION

1. On or about April 4, 1972, Plaintiff and Defendant entered into an agreement in writing, a copy of which is hereto annexed as Exhibit B.

2. In accordance with the provisions of said agreement, Plaintiff tendered to Defendant the purchase price and requested a conveyance of the land, but Defendant refused to make the conveyance.

3. In accordance with the terms of said agreement, Plaintiff has deposited the full purchase price to the account of the Defendant at the American Bank, Port Clinton, Ohio, and a copy of the deposit slip is attached hereto as Exhibit C.

WHEREFORE Plaintiff demands that Defendant be required specifically to perform said agreement and that Plaintiff be awarded such damages as are just and equitable as may be occasioned by Defendant's delay in specifically performing said agreement, and for such other relief as may be just and equitable in the premises.

/s/ PAUL C. MOON

Paul C. Moon, Attorney for
Plaintiff

MOON, MOON & NOBLITT
222 East Second Street
Port Clinton, Ohio 43452
Phone: 732-3145

Exhibit A to Complaint

Parcel No. 5

For and in consideration of twenty —— no/xx —— Dollar ($20.00) in hand paid, receipt of which is hereby acknowledged, the undersigned Grantor (s) hereby give and grant unto Ohio Edison Company, an Ohio corporation, the Grantee, the right and option to purchase at any time on or before the 31st day of March, 1973, an easement and right of way with certain rights and privileges for lines for the transmission and distribution of electric current, including telephone and telegraph, upon, over, under and across the following described premises, situated in the Township of Portage, County of Ottawa, State of Ohio, being a part of Section 5, Township 6 North, Range 17 East.

The approximate location of said right of way is as follows:

An irregular-shaped parcel of land bounded on the east by Grantors' easterly property line, bounded on the southeast by the northwesterly limits of an easement granted Ohio Edison Company by John Holly, Sr. on March 25, 1955 and recorded in Volume 178, Page 230 of the Ottawa County Deed Records, bounded on the south by Grantors' southerly property line, and bounded on the northwest by the northwesterly line of right of way, which northwesterly line of right of way is described as follows:

The northwesterly line of said right of way enters Grantors' premises from the land of Howard Dye at a point on said Grantors' easterly property line approximately 29 rods northerly from Grantors' southeast corner; thence from this point in a general southwesterly direction across Grantors' premises approximately 30 rods to a point on Grantors' southerly property line approximately 4 rods

westerly from Grantors' southeast corner where said line crosses to the lands of John Holly, Jr.

The exact location of said right of way is to be designated by Grantee after its final surveys are made and in any event before the construction of said line shall be commenced.

The undersigned Grantor (s) agree, if this option becomes effective by acceptance according to the terms hereof, to permit and convey to Grantee the right to erect, inspect, operate, replace, relocate, repair, patrol and permanently maintain upon, over, under and along the above described right of way across said premises, all necessary structures, wires, cables and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, including telephone and telegraph, and the right of reasonable ingress and egress upon, over and across said premises for access to and from said right of way, and the right to trim, cut, remove or control by any other means at any and all times such trees, limbs and underbrush within or adjacent to said right of way as may interfere with or endanger said structures, wires or appurtenances or their operation.

The undersigned Grantor (s) reserve the right to use the ground between said structures and beneath said wires, provided that such use does not interfere with or obstruct the rights herein granted, and the Grantor (s) agree that no building, obstruction or impediment of any kind shall be placed within said right of way or between said structures or beneath said wires without prior written approval of the Grantee.

The Grantee will repair or replace all fences, gates, driveways, drains and ditches damaged or destroyed by it on said premises or pay Grantor (s) for all damage to fences, gates, lanes, driveways, drains, ditches, crops and stock on said

premises caused by the construction or maintenance of said lines.

All of the provisions contained in this option shall, on or before the date first herein before written and upon acceptance by Grantee, be incorporated into a final instrument of conveyance, with release of dower, provided Grantee pays or tenders to Grantor (s) or their heirs, executors, administrators or assigns, in full satisfaction of the rights optioned, the sum of ($400.00) Dollars which Grantor (s) agree to accept in such satisfaction and which shall be paid or tendered before the construction of said lines shall be commenced. Such tender or payment may be made to Grantor (s) or to their heirs, executors, administrators or assigns, or such sum may be deposited by Grantee to their credit in The American Bank, Port Clinton, Ohio, which is hereby authorized to accept same and to acknowledge receipt thereof, and such tender, payment or deposit shall constitute a full compliance of Grantee's obligations hereunder, and Grantor (s) shall forthwith execute and deliver a final instrument of conveyance, with release of dower, to Grantee, its successors and assigns. Upon such tender, payment or deposit being made, Grantee, its successors and assigns, shall have the immediate right to go upon said premises for the purpose of constructing, maintaining and operating said lines.

The Grantor (s) represent that they are the owners of the premises herein described.

The easements, benefits and burdens hereby optioned shall inure to the benefit of and be binding upon the parties hereto, their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, I, the Grantor, hereunto set my hand this 4th day of April, 1972.

/s/ D. R. CAMPBELL

/s/ JOHN HOLLY, JR.

Exhibit B to Complaint

Parcel No. 6

For and in consideration of twenty —— no/xx —— Dollars ($20.00) in hand paid, receipt of which is hereby acknowledged, the undersigned Grantor (s) hereby give and grant unto Ohio Edison Company, an Ohio corporation, the Grantee, the right and option to purchase at any time on or before the 31st day of March, 1973, an easement and right of way with certain rights and privileges for lines for the transmission and distribution of electric current, including telephone and telegraph, upon, over, under and across the following described premises, situated in the Township of Portage, County of Ottawa, State of Ohio, being a part of Sections 5 and 8, Township 6 North, Range 17 East.

The approximate location of said right of way is as follows:

CROSSING NO. 1

A strip of land abutting and parallel to an existing easement granted Ohio Edison Company by John Holly, Jr. on March 25, 1955 and recorded in Volume 178, Page 234 of the Ottawa County Deed Records, said strip of land being 35 feet wide, 25 feet on the northwesterly side and to the northwesterly limits of said existing easement on the southeasterly side of a survey line, which survey line of right of way is described as follows:

The survey line of said right of way enters Grantor's premises from the land of John Holly, Jr., et al., at a point on said Grantor's upper northerly property line approximately 34 rods easterly from Grantor's upper northwest corner; thence from this point in a general southwesterly direction across Grantor's premises approximately 33 rods to a point on the northwesterly limits of State Route 2

right of way; thence continuing in said southwesterly direction across said State Route 2 right of way approximately 29 rods to a point on the southeasterly limits of State Route 2 where said survey line re-enters Grantor's premises; thence continuing in said southwesterly direction across Grantor's premises approximately 39 rods to a point on Grantor's upper southerly property line, said line being the southerly line of Section 5, approximately 51 rods westerly from Grantor's upper southeast corner, said corner being the southeasterly corner of Section 5, where said line crosses to the lands of B. E. and B. A. Heileman.

CROSSING NO. 2

A strip of land 50 feet wide, 25 feet on each side of a center line, which center line of right of way is described as follows:

The center line of said right of way enters Grantor's premises from the land of B. E. and B. A. Heileman at a point on said Grantor's lower easterly property line approximately 101 rods northerly from Grantor's lower southeast corner, said corner being in the center of Lockwood Road; thence from this point in a general southwesterly direction across Grantor's premises approximately 81 rods to an angle point where said survey line angles to the right approximately 23 degrees; thence from this point in a general westerly direction approximately 5 rods to a point on Grantor's lower westerly property line approximately 72 rods northerly from Grantor's southwest corner, said corner being in the center of Lockwood Road, where said line crosses to the lands of H. and B. Johannsen.

Together with the right to install guy wires and anchors within or adjacent to the right of way herein granted wherever necessary.

The exact location of said right of way is to be designated

by Grantee after its final surveys are made and in any event before the construction of said lines shall be commenced.

The undersigned Grantor (s) agree, if this option become effective by acceptance according to the terms hereof, to permit and convey to Grantee the right to erect, inspect, operate, replace, relocate, repair, patrol and permanently maintain upon, over, under and along the above described right of way across said premises, all necessary structures, wires, cables and other usual fixtures and appurtenances used for or in connection with the transmission and distribution of electric current, including telephone and telegraph, and the right of reasonable ingress and egress upon, over and across said premises for access to and from said right of way, and the right to trim, cut, remove or control by any other means at any and all times such trees, limbs and underbrush within or adjacent to said right of way as may interfere with or endanger said structures, wires or appurtenances or their operation.

The undersigned Grantor (s) reserve the right to use the ground between said stuctures and beneath said wires, provided that such use does not interfere with or obstruct the rights herein granted, and the Grantor (s) agree that no building, obstruction or impediment of any kind shall be placed within said right of way or between said structures or beneath said wires without prior written approval of the Grantee.

The Grantee will repair or replace all fences, gates, lanes, driveways, drains and ditches damaged or destroyed by it on said premises or pay Grantor (s) for all damage to fences, gates, lanes, driveways, drains, ditches, crops and stock on said premises caused by the construction or maintenance of said lines.

All of the provisions contained in this option shall, on

or before the date first herein before written and upon acceptance by Grantee, be incorporated into a final instrument of conveyance, with release of dower, provided Grantee pays or tenders to Grantor (s) or their heirs, executors, administrators or assigns, in full satisfaction of the rights optioned, the sum of ($3100.00) Dollars which Grantor (s) agree to accept in such satisfaction and which shall be paid or tendered before the construction of said lines shall be commenced. Such tender or payment may be made to Grantor (s) or to their heirs, executors, administrators or assigns, or such sum may be deposited by Grantee to their credit in The American Bank, Port Clinton, Ohio, which is hereby authorized to accept same and to acknowledge receipt thereof, and such tender, payment or deposit shall constitute a full compliance of Grantee's obligations hereunder, and Grantor (s) shall forthwith execute and deliver a final instrument of conveyance, with release of dower, to Grantee, its successors and assigns. Upon such tender, payment or deposit being made, Grantee, its successors and assigns, shall have the immediate right to go upon said premises for the purpose of constructing, maintaining and operating said lines.

The Grantor (s) represent that they are the owners of the premises herein described.

The easements, benefits and burdens hereby optioned shall inure to the benefit of and be binding upon the parties hereto, their respective heirs, executors, administrators, succssors and assigns.

IN WITNESS WHEREOF, I, the Grantor, hereunto set my hand this 4th day of April, 1972.
my hand this 4th day of April, 1972.

/s/ D. R. CAMPBELL

/s/ JOHN HOLLY, JR.

Exhibit C to Complaint

———

(Filed March 26, 1973)

Deposited with
THE AMERICAN BANK

Date		Account No.	Deposit Amount	
03/26/73	00D0107	00-007547-1	3,500.00	NO BOOK

This is your receipt — Subject to actual final payment of deposited items
Deposits are accepted subject to verification for accuracy

Always obtain a registered receipt when making a deposit
NON-NEGOTIABLE

Bank symbol, transaction number and amount of deposit are shown above

J. HOLLY, JR.